No. 90-1507

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1990

THE EMPIRE CLUB, a general partnership,

Petitioner,

vs.

BIJOU IRRIGATION DISTRICT, JACKSON LAKE RESERVOIR AND IRRIGATION COMPANY, THE FARMERS RESERVOIR AND IRRIGATION COMPANY, VIOLET L. PETERSON, ROSE IRENE CAMPBELL, STEPHEN CAMPBELL, B.J. PEGGRAM, FRANCIS E. PEGGRAM, TERRY CHAPMAN, CONNIE CHAPMAN, HARRY KOHLER, ROBERT L. WALTNER, CAROL J. WALTNER, ERVIN L. MICHAELSON, JOHN ROTH, CHARLES B. RUMSEY, LEE D. THOMPSON, RAYMOND R. RICHARDSON, GORDON A. PRICE, and BETTY B. PRICE,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Colorado

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a landowner's reasonable recreational use of the surface of an irrigation reservoir abutting and overlying his land is excluded as a matter of law by the right of way granted by the United States for the reservoir under the Right of Way Permit Act of March 3, 1891 (ch. 561, § 18, 26 Stat. 1101 (1891), 43 U.S.C. § 946 (1988)).

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The opinion and judgment of the Colorado Supreme Court, as modified on denial of petition for rehearing, is printed at Appendix 1, and is reported at 804 P.2d 175 (Colo. 1991). The trial court's Judgment and Decree, printed at Appendix 2, is unreported.

JURISDICTION

The opinion of the Colorado Supreme Court was issued January 14, 1991. The Empire Club filed its Petition for Rehearing January 21, 1991. On February 4, 1991, the Colorado Supreme Court modified its opinion, and denied the Petition for Rehearing. On February 27, 1991, the Colorado Supreme Court recalled its mandate for thirty days, but ordered that any further stay orders would have to be sought in this Court. App. 58.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1988).

STATUTES

The Right of Way Permit Act of March 3, 1891 ("1891 Act"), as amended prior to the grant of the reservoir right of way to the Bijou Irrigation District in 1907, provided in pertinent part that,

> The right of way through the public lands and reservations of the United States is hereby

> granted to any canal or ditch company[1] formed for the purpose of irrigation, and duly organized under the laws of any State or territory . . . to the extent of the ground occupied by the water of any reservoir and of any canals and laterals and fifty feet on each side of the marginal limits thereof. . . . [2]

Ch. 561, § 18, 26 Stat. 1101 (1891), now codified, with amendments, as 43 U.S.C. § 946 (1988).

STATEMENT OF THE CASE

The Bijou Irrigation District owns a right of way granted under the foregoing statute for an irrigation reservoir known as Empire Reservoir. It brought this action against the Empire Club ("Petitioner") and others who own land abutting and underlying the reservoir (collectively, the "Landowners") for a declaratory judgment, to

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[1] The provision was amended in 1917 to add "or drainage district" after "canal or ditch company," ch. 184, § 1, 39 Stat. 1197, and in 1926 to substitute "canal ditch company, irrigation or drainage district" for "canal or ditch company or drainage district," ch. 409, 44 Stat. 668.

[2] The statute provided for filing of the articles of incorporation of the company and a map of the reservoir with the Secretary of the Interior. Ch. 561, § 18, 26 Stat. 1101 (codified as amended at 43 U.S.C. § 946 (1988)) and § 19, 26 Stat. 1102 (codified as amended at 43 U.S.C. § 947 (1988)). After approval of the map by the Secretary, and notation of such approval on plats in the Secretary's office, "all such lands over which such rights of way shall pass shall be disposed of subject to such right of way." Ch. 561, § 19, 26 Stat. 1102 (codified as amended at 43 U.S.C. § 947 (1988)).

quiet title, to enjoin their use of the reservoir for recreational purposes, and to recover damages for trespass. App. 5. The District claimed the right under the 1891 Act to prohibit all use of the reservoir by the Landowners, App. 9, 43, 44, and asked the trial court to "declare a right in the District for the exclusive authority to use the Reservoir for purposes of recreational and piscatorial purposes." App. 47, See App. 44.

The trial court concluded that the District owned only a nonexclusive federal right of way for a reservoir, and entered judgment that the abutting Landowners, including the Empire Club, "have the right to use the surface, in common and in a reasonable manner, with the District." App. 55, See App. 5.

The District appealed to the Colorado Court of Appeals, which did not decide the case, but certified to the Colorado Supreme Court "that [this] case raises issues of first impression that have significant public interest and involves legal principles of major significance." App. 5. The Colorado Supreme Court accepted jurisdiction, and consolidated the present case with a second case involving the same parties for issuance of a single opinion. App. 4. The second case is not before this Court.

The Colorado Supreme Court affirmed the trial court's conclusion that the District owns only an easement for the storage of irrigation water, App. 9, 16, but concluded that recreational use of the surface by owners of the servient estate is excluded as a matter of law by the District's right to store irrigation water in the reservoir. App. 17, 18, 21 and 24. The Colorado Supreme Court

accordingly reversed the trial court's judgment that the servient Landowners, including the Empire Club, have a right to reasonable use of the surface for recreation, and remanded the case for entry of a decree consistent with the court's opinion. App. 24, 29.

Empire Reservoir covers almost 2,100 acres of land near the City of Fort Morgan in the Counties of Weld and Morgan in the State of Colorado. It is used to store irrigation water for the District, which supplies irrigation water to approximately 200 farmers in Northeastern Colorado for approximately 19,000 acres of land. App. 7. The District was organized on April 12, 1905, pursuant to Colorado's Irrigation District Law of 1905, Colo. Rev. Stat. § 37-41-101 to 160 (1990). The District acquired its interest in the reservoir site from the United States on May 9, 1907, pursuant to the 1891 Act. App. 7.

The Landowners, including the Empire Club, own property adjacent to and underlying portions of the reservoir. They derive their titles through patents from the United States. App. 8. A small portion of the land beneath Empire Reservoir is owned by the District. The balance, making up the majority of the land underlying the reservoir, is owned by the United States of America and the State of Colorado. App. 8.

The District and the Landowners have historically used the reservoir for recreation, as has the general public to a lesser extent. Some of the Landowners have sold memberships for recreational use of the reservoir, and the District also has leased rights to private clubs for these purposes. App. 8.

In the trial court, the Empire Club asserted, *inter alia*, that (a) the District does not own the reservoir site, but

operates the reservoir pursuant to a federal right of way granted under §§ 18-21 of the 1891 Act, 26 Stat. 1095, 1101, 43 U.S.C. §§ 946-949, as amended by the Act of May 11, 1891, see App. 66-69; and that (b) the federal right of way under which the District occupies and operates the reservoir is "a nonexclusive easement which gives the District no right to exclude the defendants." App. 66.

The trial court made seventeen pages of findings and conclusions, and entered a judgment and decree. See App. 31-55. The trial court found, *inter alia*, that (a) "the recreational use of the water has not deprived the farmers, included in the irrigation district, from obtaining the quality and quantity of water to which they are entitled," App. 32; (b) "[t]he Reservoir has been used since its existence by private landowners and a small amount of the public," App. 39; (c) "[s]ince the fifties the water has been used for boating, water skiing and general recreation," App. 39; (d) "all of these activities coexisted without interference to the management of the Reservoir," App. 39; (e) "the defendants' use of the reservoir has never prevented or impeded the District from storing or delivering the needed quantity or quality of water to the District members," App. 41; and (f) "[t]he Plaintiff have [sic] made no showing that the use is unreasonable with the landowners. To the contrary, the Plaintiff has argued that *any use* is prohibited without their approval." (Emphasis in original) App. 54. The trial court also found that "[n]o claim has been presented to this court that any party is making a nuisance of themselves or making an unreasonable use of the reservoir." App. 44.

After making these findings of fact, the trial court specified the issues, see App. 43-44, and determined that

it would resolve, *inter alia*, (a) whether the District's interest in the reservoir site was "a limited fee entitling it to exclusive possession and use of the reservoir site and water thereon"; and (b) whether the Landowners "have the right to use the surface of the reservoir water." App. 44. It then concluded as a matter of law that,

> [f]ollowing the rationale set out in the more recent cases by the U.S. Supreme Court and the Colorado Supreme Court, it would appear that the grant set out in 43 USC § 946 is an easement. The easement, a right or privilege, was not exclusive. Therefore, the other landowners, with land abutting and underlying the Reservoir, have a right to use the surface in common and in a reasonable manner with the irrigation company.

App. 53. The trial court accordingly entered judgment, *inter alia*, that "Defendants [including the Empire Club] who have land abutting and underlying the Reservoir, have the right to use the surface, in common and in a reasonable manner, with the District." App. 55. The District appealed.

In an appellate brief, the Empire Club asserted, *inter alia*, that the owner of an 1891 right of way has only a nonexclusive easement under federal law, and that the right of way "does not empower the District to exclude the landowners or members of the public with lawful access to the Reservoir." App. 70. The Empire Club relied upon this Court's opinion in *Great Northern Railway Co. v. United States*, 315 U.S. 262 (1942), state and federal court opinions, and Interior Board of Land Appeals decisions, all rejecting claims of the right to exclude others from an 1891 right of way. See App. 70-79.

Among other cases, the Empire Club relied upon *United States v. Big Horn Land & Cattle Co.*, 17 F.2d 357 (8th Cir. 1927), in which the defendant claimed the right to exclude all other persons and the public generally from fishing in lakes situated on an 1891 reservoir right of way. *Id.* at 359. The Eighth Circuit reversed a United States District Court for Colorado judgment that the 1891 right of way allowed its owner exclusive use of a reservoir site, and the water stored thereon, and stated that the "defendant, of course, will have equal access and privileges with all other citizens of the United States to Big Creek Lakes." *Id.* at 366. See App. 74.

The Colorado Supreme Court determined that the District's

> declaratory judgment action does not directly involve either the right to the use of water or the ownership of a water right. Instead, it relates to the nature and scope of interests in the land upon which the Empire Reservoir is situated based on the construction of the grant by which the District acquired its right to build and maintain the reservoir.

App. 10. It determined that "the critical question is whether the District's right to store water in the reservoir is exclusive of any right by the Petitioners to use the reservoir for recreational purposes." App. 18.

Without citing or distinguishing *Big Horn*, the Colorado Supreme Court held that the right to store irrigation water excludes recreational use as a matter of law. App. 18, 21, 23, 24. It did, however, acknowledge that the federal grant of the reservoir easement to the District is not characterized as exclusive under the 1891 Act or its

applicable amendments, App. 19, and it classified the grant as an easement rather than a limited fee. App. 29.

The Colorado Supreme Court went on to recognize "the right of the appropriator to control the stored water," App. 20, and relied upon Colorado's water law and easement law to conclude that the use of the reservoir by the Landowners for recreational purposes is inconsistent with the nature and purpose of the grant. See App. 17-22. In short, it held that the right to store irrigation water excludes reasonable recreational use of the stored water as a matter of state law. See App. 17-22.

The Empire Club petitioned for rehearing, and argued, *inter alia*, that the Colorado Supreme Court erred when it construed the federal grant under Colorado's water law and easement law, rather than federal law. See App. 60. In part, the Empire Club relied on *City & County of Denver v. Berglund*, 517 F. Supp. 155 (D. Colo. 1981), *aff'd in part, rev'd in part*, 695 F.2d 465 (10th Cir. 1982), for the principle that Colorado's common law does not control the determination of the scope and effect of the federal right of way interest. See App. 60. The Empire Club also directed the Colorado Supreme Court's attention to Peterson Exhibit 5 (Appendix 8, App. 80-81), wherein the State Supervisor of the Bureau of Land Management determined on February 11, 1960, that "[i]t appears that the recreational uses of the public lands [underlying Empire Reservoir] are compatible with the purpose for which the reservoir was constructed, that of impounding water for irrigation." App. 81.

Although the Empire Club had cited *Great Northern, Big Horn, Grindstone Butte Project, Berglund, Utah Power*

and Light, and others, the Colorado Supreme Court responded to the Empire Club's argument that it had improperly applied state law, rather than federal law, by adding a single footnote (No. 17, App. 21).

> In reaching this result, we have relied to a great extent on Colorado cases setting forth general principles of the law of easements. The Landowners have argued that federal law, not state law, should be applied. We have discovered nothing to suggest that any federal law applicable to construing the scope of easements granted under the 1891 Act is at variance with the general principles set forth in our own cases.

See Appendix 3, App. 56. The petition for rehearing was denied. App. 56.

REASONS FOR GRANTING THIS PETITION

A. THE COLORADO SUPREME COURT HAS CONSTRUED THE RIGHTS OF THE HOLDER OF AN 1891 RIGHT OF WAY IN A WAY THAT CONFLICTS WITH *UNITED STATES V. BIG HORN LAND & CATTLE CO., GRINDSTONE BUTTE PROJET, CITY & COUNTY OF DENVER V. BERGLUND,* AND *COULSEN V. ABERDEEN-SPRINGFIELD CANAL CO.*

1. The Eighth Circuit Court of Appeals.

This Court's attention is respectfully directed to *United States v. Big Horn Land & Cattle Co.*, 17 F.2d 357 (8th Cir. 1927), where the court dealt with the "Big Creek Lakes" in Jackson County, Colorado. Like the District in this case, the defendant in *Big Horn* owned an 1891 reservoir easement, and claimed the right "to keep persons

from trespassing upon, fishing in, or otherwise using the waters." *Id.* at 360. The Eighth Circuit Court of Appeals reversed a United States District Court for Colorado conclusion of exclusivity, and stated that "[t]he defendant, of course, will have equal access and privileges with all other citizens of the United States to Big Creek Lakes." *Id.* at 366.

2. The Ninth Circuit Court of Appeals.

The pertinent text of the decision of the Interior Board of Land Appeals in *Grindstone Butte Project*, 18 IBLA 16 (1974), is quoted:

> *The grant of a right of way under the 1891 Act does not include exclusive possession and control of the area.* In *United States v. Big Horn Land & Cattle Co.*, 17 F.2d 357, 366 (8th Cir. 1927), the court held that a right granted under the 1891 Act, which included use of a natural lake as a reservoir, did not carry with it exclusive fishing rights in the Lake. The right was held subject to access and privileges by United States citizens. See *Zelph S. Calder, supra*, at 39, 81 I.D. at 345.

(Emphasis added.) 18 IBLA at 19. The IBLA decision was reversed in an unpublished opinion by the United States District Court for Idaho. The Ninth Circuit Court of Appeals reversed the lower court in *Grindstone Butte Project v. Kleppe*, 638 F.2d 100 (9th Cir. 1981), thus affirming the IBLA decision.

3. The Tenth Circuit Court of Appeals.

The Colorado Supreme Court reasoned in the present case that an appropriator's right under state law to

"control" reservoir water vested a right in the grantee of a federal right of way to exclude all recreational use. See App. 21. The United States District Court for Colorado and the Tenth Circuit Court of Appeals have addressed the issue whether state water law and easement law vest rights in a federal right of way, and they have resolved that issue contrary to the result reached by the Colorado Supreme Court.

> [It] is incorrect that Colorado's common law controls the determination of the scope and effect of the right of way interest. Where essential interests of the federal government are concerned, rights and liabilities under government grant are determined by federal law and not state law. See, e.g., *United States v. 93.970 Acres of Land*, 360 U.S. 328.

City & County of Denver v. Berglund, 517 F. Supp. 155, 190 (D. Colo. 1981), *aff'd in part, rev'd in part*, 695 F.2d 465 (10th Cir. 1982). In sharp contrast to the Colorado Supreme Court's conclusion in the present case, the *Berglund* court squarely rejected a City and County of Denver argument that its right to "divert and utilize" water under its "Blue River Decree" entitled it to construct along a modified federal right of way. *Id.* at 483.

Ownership and the right to control appropriated water vest no right to use another's land. As the Tenth Circuit stated in *Berglund*,

> The right to appropriate the waters of a stream does not carry with it the right to burden the lands of another with a ditch for the purpose of diverting the waters and carrying them to the place of intended use, for that cannot be done without a grant from the landowner . . . ; and this although the particular circumstances be

> such that the proposed appropriation cannot be effected without the ditch.

695 F.2d at 484 (quoting *Snyder v. Colorado Gold Dredging Co.*, 181 F. 62 (8th Cir. 1910)). The *Berglund* court relied upon and quoted *Utah Power and Light Co. v. United States*, 243 U.S. 389, 411 (1917): "this is not a controversy over water-rights, but over rights of way through land of the United States, which is a different matter." 695 F.2d at 483.

4. The Idaho Supreme Court.

The Idaho Supreme Court construed an 1891 right of way for an irrigation ditch in *Coulsen v. Aberdeen-Springfield Canal Co.*, 47 Idaho 619, 277 P. 542 (1929), and held that "[n]o greater title or right to possession passes under a general grant than reasonably necessary to enable the grantee to adequately and conveniently make the intended use of his way." *Id.* at 544. The court held that the defendant had no right to exclude the fee owner from using the lands appurtenant to the right of way for grazing where such use did not interfere with the operation, maintenance or repair of the ditch.

5. Two administrative decisions should be noted.

The Interior Board of Land Appeals held in *Zelph S. Calder*, 16 IBLA 27, 81 I.D. 339 (1974), that a grant of a right of way under the 1891 Act does not allow the grantee to bar the public from fishing.

> That a reservoir right obtained under the 1891 Act does not include piscatorial privileges in the

> reservoir and allow the grantee to bar the public from fishing from federal lands covered by the right of way is clear.

81 I.D. at 245. It follows that an 1891 right of way does not allow the grantee to bar the underlying landowner from fishing.

In *Dixon v. Dry Gulch Ins. Co.*, 45 I.D. 4 (1916), the Interior Department determined that:

> It is the policy of this Department to secure the utilization of reservoir sites to the largest extent possible, and if that end can be obtained by double use, it is believed that same should be permitted. Such is the effect of the principle announced in the cases of the *Deseret Irrigation Company et al.* (40 L.D., 463) and *H. H. Tomkins* (41 L.D., 516).

B. THE COLORADO SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT, AND THE COLORADO SUPREME COURT HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH *GREAT NORTHERN RAILWAY CO. V. UNITED STATES, UNITED STATES V. 93.970 ACRES OF LAND*, AND *UTAH POWER AND LIGHT CO. V. UNITED STATES*.

1. The rights of the owner of an 1891 right of way should be settled by this Court.

As the Montana Supreme Court noted in *E.E. Eggebrecht, Inc. v. Waters*, 704 P.2d 422 (Mont. 1985), "there is a great deal of confusion over the nature of the reservoir right of way . . . under the March 3, 1891, Act. . . ." *Id.* at 424. The trial court in the present case wrote:

> Like this court, the Montana Supreme Court found a great deal of confusion over the nature of the reservoir right of way that was graned [sic] to Waters' predecessor in interest under the March 3, 1891 Act. This confusion was of course due to the *Kern* and *Great Northern* cases. They noted that the *Kern River* decision was relying on the *Stringham* decision. The concept of a limited fee was a carryover from the railroad rights of way. The Court noted, as this court has, that the U.S. Supreme Court in *Great Northern* criticized the use of that limited fee. The Court concluded at page 425, " . . . the reservoir right of way in question can safely be characterized as an easement . . . "

App. 50.

The courts have used various rationales to describe the rights held under an 1891 grant. In 1921, this Court called an 1891 grant neither a mere easement nor a fee simple absolute, but a limited fee on an implied condition of reverter in the event the grantee ceased to use or retain the land for the purpose indicated in the Act. *Kern River Co. v. United States*, 257 U.S. 147, 152 (1921). In 1927, the Eighth Circuit Court of Appeals stated: "We think, it, therefore, not important whether the interest or estate passed be considered an easement or a limited fee. In any event it is a limited fee in the nature of an easement." *Big Horn*, 17 F.2d at 365. In 1929, Idaho's Supreme Court held that "no greater title passes [under the 1891 Act] than is reasonably necessary to enable the grantee to adequately make the intended use of his way." *Coulsen*, 277 P.2d at 544. In 1942, this Court suggested in *Great Northern* that the 1891 Act vested an easement. 315 U.S. at 275-76.

Finally, the Colorado Supreme Court held in the present case that the grant was an easement that excludes recreational use as a matter of law notwithstanding numerous trial court findings that recreational use does not interfere with the use of the right of way. The District's interest more closely resembles a fee simple absolute than an easement under the Colorado Supreme Court's decision.

2. The Colorado Supreme Court has decided a federal question in a way that conflicts with applicable decisions of this Court.

This Court construed a railroad right of way in *Great Northern Railway Co. v. United States*, 315 U.S. 262 (1942), and cited the 1891 Act to support its conclusion that a railroad right of way was an easement and not a fee interest. *Id.* at 275-76. Thus, the Petitioner submits that this Court has already recognized that the 1891 Act authorized only the grant of an easement. This Court has also determined that rights and liabilities under government grant are determined by federal law and not state law. See, e.g., *United States v. 93.970 Acres of Land*, 360 U.S. 328 (1959). Further, this Court has already drawn a clear line between water rights and rights of way: "this is not a controversy over water rights, but over rights of way through land of the United States, which is a different matter." *Utah Power and Light Co. v. United States*, 243 U.S. 389, 411 (1917). The Colorado Supreme Court improperly applied Colorado's water law, not federal law, and concluded that an appropriator's right to control water excludes recreational use as a matter of law. App. 21. *Utah Power and Light* requires reversal.

CONCLUSION

A 2,100 surface acre irrigation reservoir has been used "since its existence" for recreational purposes which "coexisted without interference to the management of the Reservoir," according to the trial court. App. 39. Underlying landowners, as well as a small amount of the public, used the reservoir for recreational purposes along with the District, which "also has leased rights to private clubs for these purposes." App. 8-9.

After affirming a trial court conclusion that the federal right of way is an easement, the Colorado Supreme Court applied Colorado's water law and easement law, rather than federal law, to reverse the trial court's conclusion that the Empire Club has a right to reasonable use of the surface of the reservoir for recreational purposes, notwithstanding that Colorado's common law is irrelevant to the construction of a federal right of way, and that federal courts and the Interior Board of Land Appeals have unanimously rejected arguments of exclusive use of the 1891 right of way.

The Colorado Supreme Court has improperly broadened the interest in the right of way granted by the United States to the District. Its judgment deprives the Empire Club of a valuable recreational resource, and leaves its property valueless for recreational purposes. If its judgment is left undisturbed by this Court, the owners of similarly situated reservoirs elsewhere in the arid West will be free to exclude recreational use, or to establish themselves as

> the exclusive leasing authority and to prevent private landowners from using water above

> their land without their consent. The same rationale to exclude the private landowners would necessarily apply to the general public using state or federal land. The end result would require all persons to negotiate contracts with the [right of way owner] for recreational activities.

Trial Court Conclusion 9, App. 47. Congress did not intend in 1891 that fishermen should be excluded as a matter of law from the water stored on their land.

The Colorado Court of Appeals certified to the Colorado Supreme Court pursuant to statute "that [this] case raises issues of first impression that have significant public interest and involves legal principles of major significance." App. 5. The Empire Club concurs with the assessment of this case by the Colorado Court of Appeals, and respectfully submits that this petition should be granted.

Respectfully submitted,

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No. _____

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THE EMPIRE CLUB, a general partnership,

Petitioner,

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BIJOU IRRIGATION DISTRICT, JACKSON LAKE RESERVOIR AND IRRIGATION COMPANY, THE FARMERS RESERVOIR AND IRRIGATION COMPANY, VIOLET L. PETERSON, ROSE IRENE CAMPBELL, STEPHEN CAMPBELL, B.J. PEGGRAM, FRANCIS E. PEGGRAM, TERRY CHAPMAN, CONNIE CHAPMAN, HARRY KOHLER, ROBERT L. WALTNER, CAROL J. WALTNER, ERVIN L. MICHAELSON, JOHN ROTH, CHARLES B. RUMSEY, LEE D. THOMPSON, RAYMOND R. RICHARDSON, GORDON A. PRICE and BETTY B. PRICE,

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APPENDIX 1

SUPREME COURT, STATE OF COLORADO NO. 89SA302

January 14, 1991

BIJOU IRRIGATION DISTRICT,

Plaintiff-Appellant,

v.

THE EMPIRE CLUB, a general partnership; ERVIN L. MICHAELSON and JOHN ROTH (Lease purchase from Ervin L. Michaelson); ROSE IRENE CAMPBELL and STEPHEN CAMPBELL; B.J. PEGGRAM and FRANCIS E. PEGGRAM; TERRY CHAPMAN and CONNIE CHAPMAN; CHARLES B. RUMSEY; VIOLET L. PETERSON; LEE D. THOMPSON; HARRY KOHLER; ROBERT L. WALTNER; CAROL J. WALTNER; RAYMOND R. RICHARDSON; GORDON A. PRICE; BETTY B. PRICE; and ALL UNKNOWN PARTIES WHO CLAIM ANY INTEREST IN THE SUBJECT MATTER OF THIS ACTION,

Defendants-Appellees.

Appeal from District Court, Morgan County
Honorable Joseph J. Weatherby, Judge

EN BANC

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART

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JUSTICE LOHR delivered the Opinion of the Court.

SUPREME COURT, STATE OF COLORADO
NO. 89SA209

IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS OF BIJOU IRRIGATION DISTRICT, IN MORGAN AND WELD COUNTIES

BIJOU IRRIGATION DISTRICT,
Applicant-Appellee/Cross-Appellant,

v.

THE EMPIRE CLUB, a general partnership; ERVIN L. MICHAELSON; JOHN ROTH; JOE RUMSEY; CHARLES B. RUMSEY; LEE D. THOMPSON; HARRY KOHLER; ROBERT L. WALTNER; CAROL J. WALTNER; RAYMOND R. RICHARDSON; BETTY PRICE; and GORDON PRICE,
Opposers-Appellants/Cross-Appellees,

and

CITY AND COUNTY OF DENVER, acting by and through its Board of Water Commissioners; CITY OF THORNTON, COLORADO; and VIOLET L. PETERSON,
Opposers-Appellees,

and

ALAN BERRYMAN, DIVISION ENGINEER, WATER DIVISION 1,
Appellee.

Appeal from District Court, Water Division No. 1
Honorable Robert A. Behrman, Judge

EN BANC JUDGMENT REVERSED

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JUSTICE LOHR delivered the Opinion of the Court.

These cases are consolidated for issuance of a single opinion to resolve a dispute over recreational use of

Empire Reservoir between Bijou Irrigation District ("District"), the entity organized to administer water appropriated and stored in the reservoir, and private parties who own land underlying the reservoir ("Landowners").

In 1983 the District filed suit against the Landowners in Morgan County District Court for declaratory judgment, and to quiet title, enjoin the Landowners' use of the reservoir, and recover damages for trespass. We refer to this case, no. 89SA302, as the declaratory judgment action. The district court entered judgment in favor of the Landowners on April 23, 1987, holding that the District has an easement for the reservoir but does not have the right to exclusive use of the reservoir for recreational and piscatorial purposes. The district court further held that the Landowners have the right to use the surface of the reservoir in a reasonable manner in common with the District, thus ruling against the District on its injunction and trespass claims. The District appealed the judgment.[1] We affirm in part and reverse in part.

On April 27, 1987, the District filed an application in the District Court for Water Division 1 for a decree changing its water storage rights, originally obtained for the beneficial use of irrigation, to recognize as additional beneficial uses its historical use of water stored in the reservoir for recreational and piscatorial purposes. We refer to this case, no. 89SA209, as the water court action.

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[1] We accepted jurisdiction pursuant to § 13-4-109, 6A C.R.S. (1987), prior to final determination by the Colorado Court of Appeals, based on a certification by that court that the case raises issues of first impression that have significant public interest and involves legal principles of major significance.

The water court held that the District has the authority under the laws of this state to "operate, maintain and control the water diverted and stored in 'Empire Reservoir' [under its existing decrees] for recreational and piscatorial purposes." It found that the requested change described uses "necessary and incidental" to the diversion and storage of water for the purpose of irrigation, that the requested change would not result in any enlarged use of the decrees, and that the change would produce no material injury to other appropriators on the South Platte River. Accordingly, the water court entered judgment granting the change of water rights,[2] but expressly providing that the decree does not affect "any concurrent non-exclusive right which the underlying land owners may have to make use of the surface of the reservoir, or any part thereof, for recreational or piscatorial purposes." The Landowners appeal the judgment granting the change of water rights, and the District

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[2] The water court recognized the same appropriation dates as specified in the original decrees and described the newly decreed uses as follows:

> Use of Water:
>
> The use of the waters stored in Empire Reservoir under the hereinabove described decrees for the incidental purpose of recreational and piscatorial purposes. The use of said waters stored under the said described decrees shall be limited to the volume and amounts of those waters as historically stored in said reservoir under said decrees for irrigation purposes, and that this decree shall in no way enlarge the time, method and volumes of water stored under said decrees in accordance with the historical practices of said diversions and storage for irrigation purposes.

cross-appeals on the issue of concurrent use of the surface of the reservoir by the Landowners. We reverse the judgment granting the change of water rights. The cross-appeal is controlled by our decision in the declaratory judgment action.

The rights and obligations at issue in these cases are those vested in the parties under the statutes and legal instruments governing their relationships. These cases do not present issues concerning any rights that may exist or be created in the public to make use of Empire Reservoir. *See* n.17, below.

I.

Empire Reservoir is located in the Colorado counties of Weld and Morgan. It covers almost 2,100 acres and is used as storage for irrigation water by Bijou Irrigation District, which supplies water to approximately 200 farmers in northeastern Colorado for irrigation of approximately 19,000 acres of land. The dams impounding the reservoir water are made of earth and are classified as high hazard dams by the office of the Colorado State Engineer. The District is a municipal corporation organized on April 12, 1905, pursuant to the Irrigation District Law of 1905, § 37-41-101 to -160, 15 C.R.S. (1990). The District acquired its interest in that portion of the reservoir site at issue here on May 9, 1907, from the United States of America pursuant to the Act of March 3, 1891, authorizing grants of rights of way for irrigation and now codified at 43 U.S.C. § 946 (1988). The District's right to divert water from the South Platte River and store it in the reservoir for the purpose of irrigation was

recognized by judicial decrees setting forth the following amounts and priorities:

(1) Priority No. 24 – 37,709 acre-feet – appropriation date 5/10/05

(2) Priority No. 79-A – 30 feet gauge height – appropriation date 5/18/05

(3) Priority No. 34-R – 37,709 acre-feet – appropriation date 12/31/29.

The Landowners own property adjacent to and underlying portions of the reservoir. They derive their titles through patents from the federal government. The Landowners acquired their property with notice of the District's interest and took title subject to that interest. A small portion of the remaining land beneath the reservoir is owned by the District. The balance, making up the majority of the land underlying the reservoir, is owned by the Bureau of Land Management and by the State of Colorado.[3]

Historically, both the District and the Landowners have used the reservoir for recreation. The general public has also used the reservoir to a limited extent for that purpose. Some of the Landowners have sold commercial memberships for recreational use of the reservoir, and the District also has leased rights to private clubs for these

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[3] On March 7, 1944, the State of Colorado granted a right of way to the District for that part of the reservoir site on state lands in Section 36, Township 4 North, Range 61 West of the 6th Principal Meridian. The District stipulated with the State in the declaratory judgment action that the State owns fee title to all state lands underlying the reservoir and agreed that the relief sought in that action would not adversely affect Colorado's property rights.

purposes. It is the expanding commercial use by the private Landowners that led the District to seek a declaratory judgment recognizing its right to prohibit or control all use of the reservoir by the Landowners.[4]

We first consider the issues presented by the declaratory judgment action and then address those arising from the water court action.

II.

The Morgan County District Court held that the District's interest in the land underlying the reservoir is an easement. We agree. We do not agree, however, that a right to use the surface of the reservoir by the Landowners follows from that conclusion.

A.

As a preliminary matter we must address the District's assertion that the trial court in the declaratory judgment action lacked jurisdiction to rule on the right to use the surface of water stored in the reservoir because it involves a water matter. Water judges in the district

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[4] The District adduced testimony at the trial of the declaratory judgment action about problems concerning the impairment of the structural integrity of earth-fill dams that can result from motor vehicle travel on the dams and displacement of concrete, rocks and tires used for rip-rap on the embankments. The District's evidence suggested, however, that the principal precipitating cause of the litigation was the District's difficulty in obtaining liability insurance. The district court specifically held that the availability of liability insurance was not relevant to the issues presented for resolution.

courts "have exclusive jurisdiction of water matters within the division, and no judge other than the one designated as a water judge shall act with respect to water matters in that division." § 37-92-203(1), 15 C.R.S. (1990). "Water matters" include "only those matters which [article 92] and any other law shall specify to be heard by the water judge of the district courts." *Id.* Thus, an action for determination of a water right or a change of water right, each of which concerns the right to use of water, is a water matter within the exclusive jurisdiction of the water judge. *See id.*; § 37-92-302(1), 15 C.R.S. (1990); *Humphrey v. Southwestern Development Co.*, 734 P.2d 637, 640-41 (Colo. 1987). An action to determine ownership of a water right, however, is not committed to the exclusive jurisdiction of a water judge but is within the general jurisdiction of the district courts of this state. *Humphrey*, 734 P.2d at 641.

The declaratory judgment action does not directly involve either the right to use of water or the ownership of a water right. Instead, it relates to the nature and scope of interests in the land upon which the Empire Reservoir is situated based on the construction of a grant by which the District acquired its right to build and maintain the reservoir. The construction of instruments of grant or conveyance and the identification of the legal rights transferred and retained pursuant to such instruments are matters traditionally within the jurisdiction of the district courts of this state even when construction of an instrument will have an incidental impact on the use of water on the land. *See, e.g., Navajo Development Co., Inc. v. Sanderson*, 655 P.2d 1374, 1376 (Colo. 1982) (action for breach of warranties in a deed conveying water rights

brought in district court); *Atchison v. Englewood*, 193 Colo. 367, 370, 568 P.2d 13, 15-16 (1977) (action for reformation of agreement concerning preemptive right to purchase land and water rights brought in district court); *Raber v. Lohr*, 163 Colo. 485, 486, 431 P.2d 770, 771 (1967) (action requiring construction of quit claim deed conveying water right brought in district court); *Gilpin Investment Co. v. Perigo Mines Co.*, 161 Colo. 252, 257, 421 P.2d 477, 478 (1966) (quiet title action over land, mineral rights and water rights brought in district court); *Thompson v. Blanchard*, 116 Colo. 27, 28, 178 P.2d 422, 423 (1947) (action involving title to land, water rights and easement for an irrigation lateral brought in district court). The fact that the legal rights and burdens incident to the various interests in a reservoir site may preclude a particular beneficial use of water at that location does not convert the determination of such rights and burdens into a "water matter." We hold that the Morgan County District Court had jurisdiction to determine the ownership interests in the site for the Empire Reservoir.

B.

The District obtained the right to use the portion of the reservoir site at issue here by a federal grant pursuant to the Act of March 3, 1891, authorizing grants of rights of way for irrigation. The nature and extent of the District's rights to the reservoir site, therefore, must be determined by construction of the grant. The 1891 Act, as amended prior to the grant to the District in 1907, provided in pertinent part:

> That the right of way through the public lands and reservations of the United States is hereby

> granted to any canal or ditch company[5] formed for the purpose of irrigation . . . to the extent of the ground occupied by the water of any reservoir . . . and fifty feet on each side of the marginal limits thereof.[6]

Ch. 561, § 18, 26 Stat. 1101 (1891).[7]

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[5] The provision was amended in 1917 to add "or drainage district" after "canal or ditch company," ch. 184, § 1, 39 Stat. 1197, and in 1926 to substitute "canal ditch company, irrigation or drainage district" for "canal or ditch company or drainage district," ch. 409, 44 Stat. 668.

[6] The statute provided for filing of the articles of incorporation of the company and a map of the reservoir with the Secretary of the Interior. Ch. 561, § 18, 26 Stat. 1101 (codified as amended at 43 U.S.C. § 946 (1988)) and § 19, 26 Stat. 1102 (codified as amended at 43 U.S.C. § 947 (1988)). After approval of the map by the Secretary, and notation of such approval on plats in the Secretary's office, "all such lands over which such rights of way shall pass shall be disposed of subject to such right of way." Ch. 561, § 19, 26 Stat. 1102 (codified as amended at 43 U.S.C. § 947 (1988)).

[7] Now codified, with amendments, as 43 U.S.C. § 946 (1988). 43 U.S.C. § 946 was repealed in 1976 with respect to public land administered by the Bureau of Land Management and land in the National Forest system. Federal Land Policy and Management Act of 1976, Pub. L. 94-579, § 706(a), 90 Stat. 2793 (codified as 43 U.S.C. §§ 1701-1784 (1988)). The 1976 Act established new guidelines for grants of rights of way and gave the Secretary of the Interior authority to issue grants on BLM land and the Secretary of Agriculture similar authority over National Forest land. Pub. L. 94-579, § 501(a), 90 Stat. 2776 (codified as 43 U.S.C. § 1761 (1988)). The 1976 Act specified, however, that "[n]othing in this title shall have the effect of terminating any right-of-way . . . heretofore issued." Pub. L. 94-579, § 509(a), 90 Stat. 2781 (codified as 43 U.S.C. § 1769 (1988)).

In 1921 the United States Supreme Court, interpreting the 1891 Act, stated in dictum[8] that "[t]he right of way intended by the act was neither a mere easement nor a fee simple absolute, but a limited fee on an implied condition of reverter in the event the grantee ceased to use or retain the land for the purpose indicated in the act." *Kern River Co. v. United States*, 257 U.S. 147, 152 (1921). In support of this conclusion, the Court cited *Rio Grande Western R. Co. v. Stringham*, 239 U.S. 44 (1915), in which essentially identical language in the 1875 Act granting rights of way to railroads[9] was construed as conveying a limited fee.[10] *Kern River*, 257 U.S. at 152.

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[8] The irrigation company in *Kern River* had used the land obtained pursuant to the 1891 Act for the sole purpose of electric power generation. *Kern River*, 257 U.S. at 150. The Court held that the grant was conditioned on use for the main purpose of irrigation with all other uses subsidiary. *Kern River*, 257 U.S. at 153. Construction of the condition, *not* the distinction between an easement and a fee, was necessary for that holding.

[9] The 1875 Act provides in pertinent part:

> That the right of way through the public lands of the United States is hereby granted to any railroad company . . . to the extent of one hundred feet on each side of the central line of said road.

Ch. 152, § 1, 18 Stat. 482.

[10] In *Stringham*, the Court stated that a legal interest granted by the 1875 Act "and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee." *Stringham*, 239 U.S. at 47.

In 1942 the United States Supreme Court reconsidered the nature of a railroad grant under the 1875 Act construed in *Stringham* and held that Congress intended to grant only an easement. *Great Northern Railway Co. v. United States*, 315 U.S. 262, 271 (1942). The Court noted that in 1871, in response to public disfavor, Congress discontinued its policy of granting land subsidies to railroads in favor of a grant of a mere "right of passage." 315 U.S. at 275. The Court declined to follow *Stringham*, which had not considered the legislative history. 315 U.S. at 279 The Court also found persuasive the fact that subsequent to administrative interpretation of the 1875 Act as providing for grants of easements, Congress indicated approval by "repeat[ing] the language of the Act in granting canal and reservoir companies rights of way by the Act of March 3, 1891," the statute at issue here. 315 U.S. at 275. Moreover, the Court noted that the 1875 Act provided that upon notation of the location of a right of way on the plats in the local land office, "all such lands *over* which such right of way shall pass shall be disposed of *subject to* such right of way," a reserved right of disposition "wholly inconsistent with the grant of a fee." *Great Northern*, 315 U.S. at 271 (emphasis added in *Great Northern*). The 1891 Act contains language identical to the quoted provision of the 1875 Act. Act of March 3, 1891, ch. 561, § 19, 26 Stat. 1102 (codified as amended at 43 U.S.C. § 947 (1988)). The Court also observed that the 1875 Act is "subject to the general rule of construction that any ambiguity in a grant is to be resolved favorably to a sovereign grantor." *Great Northern*, 315 U.S. at 272 (citing *Caldwell v. United States*, 250 U.S. 14, 20-21 (1919)).

We hold that *Great Northern* provides compelling authority for construction of the 1891 Act as authorizing grants of easements, not limited fees. *Great Northern* effectively overruled *Stringham*,[11] the basis for the statement in *Kern* that a limited fee was intended by the 1891 Act. In doing so, it reviewed legislative history not considered by the Court in *Kern*. Importantly, *Great Northern* made specific reference to the 1891 Act as reflecting approval of the administrative interpretation of the 1875 Act as providing for grants of easements. 315 U.S. at 275; *see, e.g.*, House Report No. 2790, 54th Cong. 2d Sess. (1897) (including letter from the Assistant Commissioner of the General Land Office of the Department of the Interior reflecting this administrative interpretation). Additionally, the language of the 1875 Act providing that disposition of lands over which a right of way shall pass shall be subject to the right of way is identical to a provision in the 1891 Act under which the District acquired its rights.[12] Although

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[11] In declining to follow *Stringham* the Court stated that the "conclusion [in *Stringham*] is inconsistent with the language of the Act, its legislative history, its early administrative interpretation and the construction placed on it by Congress in subsequent legislation. We therefore do not regard it as controlling." *Great Northern*, 315 U.S. at 279.

[12] We acknowledge that the 1875 Act construed in *Great Northern* contained a provision not present in the 1891 Act, described as follows in *Great Northern*:

> Section 2 adds to the conclusion that the right granted is one of use and occupancy only, rather than the land itself, for it declares that any railroad whose right of way passes through a canyon, pass or defile "shall not prevent any other railroad company

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not controlling, we also find it persuasive that Department of the Interior regulations approved in 1900 (30 L.D. 325) concerning grants pursuant to the Act of 1891 state that "[t]he act is not in the nature of a grant of lands; it does not convey an estate in fee in the right of way." Quoted in *Homer E. Brayton*, 31 L.D. 364, 365 (July 2, 1902); *see also Grindstone Butte Project*, 18 IBLA 16, 19 (Nov. 7, 1974) ("the right-of-way under the Act was in the nature of an easement" (citing *Great Northern*)); *Fred Markle*, 6 IBLA 52, 54 (May 18, 1972) ("Since the decision of the Supreme Court in *Great Northern Railway Co. v. United States*, . . . rights-of-way granted under the March 3, 1891, Act have been considered by this Department to be easements rather than limited fees in the land.").[13] Thus, we conclude that the District holds an easement to land underlying the reservoir.[14]

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> from the *use and occupancy* of the said canyon, pass, or defile, for the purposes of its road, *in common* with the road first located."

315 U.S. at 271 (emphasis appearing in *Great Northern*). As we understand *Great Northern*, this provision was supportive of, but not essential to, the Court's decision.

[13] The Federal Land Policy and Management Act of 1976, which provides authority for new grants of rights of way over public land, expressly defines "right-of-way" to include "easement, lease, permit or license to occupy, use, or traverse [certain] public lands." Pub. L. 94-579, § 103(f), 90 Stat. 2746 (codified as 43 U.S.C. § 1702 (1988)).

[14] The conclusion that the 1891 Act should be construed to authorize grants of easements rather than limited fees is consistent as well with Colorado cases holding that the term "right

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C.

The conclusion that the District holds an easement rather than a limited fee does not end our inquiry. The question remains whether the Landowners' interests in the land include the right to use of the overlying appropriated water for recreational purposes. We hold that they do not.

The extent of the Landowners' interests as owners of the servient estate is limited by the scope of the District's rights under its easement. "The owner of the servient estate continues to enjoy all the rights and benefits of proprietorship *consistent with the burden of the easement.*" *Barnard v. Gaumer*, 146 Colo. 409, 412, 361 P.2d 778, 780 (1961) (emphasis added). *See also Osborn & Caywood Ditch Co. v. Green*, 673 P.2d 380, 383 (Colo. App. 1983) ("the owner of the land burdened by an easement . . . must not unreasonably interfere with the superior right-of-way of the person possessing the easement"); Restatement of Property § 486 (1944) ("The possessor of land subject to an easement created by conveyance is privileged to make such uses of the servient tenement as are not inconsistent

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of way" is generally construed to describe an easement. *See Hutson v. Agricultural Ditch & Reservoir Co.*, 723 P.2d 736, 739 (Colo. 1986) ("In the absence of additional descriptive language, 'right-of-way,' when used to describe an ownership interest in real property, is traditionally construed to be an easement."); *Lincoln Savings and Loan Association v. State*, 768 P.2d 733, 735 (Colo. App. 1988) ("deeds which in the granting clause convey a right-of-way over, across, or upon certain lands devolve a right only, and are generally construed as creating an easement.").

with the provisions of the creating conveyance."). The rights of an easement holder are defined by the nature and purpose of the easement. *Barnard v. Gaumer*, 146 Colo. at 412, 361 P.2d at 780. In determining the nature and purpose of the District's easement, we look first to the language of the statute by which it was created.

The 1891 Act provided for grants of rights of way "to any canal or ditch company formed for the purpose of irrigation." Ch. 561, § 18, 26 Stat. 1101. Such rights of way were "for the purpose of irrigation, but not for any other purpose." *Kern River*, 257 U.S. at 151. In 1898 additional legislation was adopted to provide that such rights of way "may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation." Act of May 11, 1898, ch. 292, § 2, 30 Stat. 404. The "main and controlling purpose" is irrigation, and all other uses are subsidiary. *Kern River*, 257 U.S. at 154-55.

The scope of the District's rights as defined by the easement's nature and purpose necessarily includes construction and maintenance of the reservoir and storage of water appropriated for irrigation. The critical question is whether the District's right to store water in the reservoir is exclusive of any right by the Landowners to use the reservoir for recreational purposes. We conclude that it is. We acknowledge the familiar principle that "[u]nless the grant conveying an easement specifically characterizes the easement as 'exclusive,' the grantor of the easement retains the right to use the property in common with the grantee." *Bergen Ditch & Reservoir Co. v. Barnes*, 683 P.2d 365, 367 (Colo. App. 1984); *accord Barnard v. Gaumer*, 146

Colo. at 412, 361 P.2d at 780. This principle, however, is limited to circumstances in which use of the property by the owner of the servient estate is consistent with the rights of the easement holder. *See Barnard*, 146 Colo. at 412-13, 361 P.2d at 780; *Skidmore v. First Bank of Minneapolis*, 773 P.2d 587, 589 (Colo. App. 1988). The holder of the servient estate may not unreasonably interfere with the superior right of the person owning the easement. *Osborn & Caywood Ditch Co.*, 673 P.2d at 383. "Conversely, the owner of the easement, or dominant estate, may do whatever is reasonably necessary to permit full use and enjoyment of the easement." *Id.*

The federal grant of the reservoir easement to the District is not characterized as exclusive under the 1891 Act or its pertinent amendments. Therefore, we must determine whether the use of the reservoir by the Landowners for recreational purposes is consistent with the nature and purpose of the grant. The purpose in question is the storage of water for irrigation.

The District uses the reservoir to store water diverted from the South Platte River by exercise of its three storage decrees. Although we have stated that water once diverted becomes the personal property of the appropriator, *Brighton Ditch Co. v. Englewood*, 124 Colo. 366, 373, 237 P.2d 116, 120 (1951), this somewhat overstates the scope of the right.[15] The principle, when applied to appropriation for storage and later application to beneficial use,

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[15] *E.g.*, water diverted by exercise of a storage right must ultimately be applied to the beneficial use for which the water was appropriated. *See Handy Ditch Co. v. Greeley & Loveland*

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was more accurately characterized in *Fort Morgan*, where we stated that "[t]he justice of allowing reservoir companies *to control the water which they have diverted* is not to be questioned; but it should be borne in mind that they do not own the water, but have only a right to its use." 71 Colo. at 262, 206 P. at 395 (emphasis added). Thus, in *Fort Morgan* we held that a reservoir company retains no ownership right over in-basin water that seeps from its reservoir. *Id.* The company, however, does have a right to control the water that remains stored in the reservoir.

The practical considerations incident to administration of a reservoir and application of these waters to irrigation use support recognition of the right of the appropriator to control the stored water. In administering water stored in a reservoir to maximize beneficial use, it is sometimes necessary to lower or raise the water level significantly in a short period of time.[16] These rapid fluctuations in water level can create hazards for users of the reservoir. This makes it essential that the reservoir owner have control of use of the reservoir in order to

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Irrigation Co. 86 Colo. 197, 199, 280 P. 481, 481 (1929). Also, to the extent stored water from in-basin sources escapes through seepage, the appropriator has no right to recapture it. *Fort Morgan Co. Reservoir & Irrigation Co. v. McCune*, 71 Colo. 256, 262, 206 P. 393, 395 (1922).

[16] In argument to this court, counsel for the District remarked that the water level in Empire Reservoir "goes up and down like mad." The evidence at the trial in the declaratory judgment action was that the reservoir water level varied widely during the cycle of filling the reservoir and discharge to meet irrigation needs.

protect the reservoir users. A reservoir owner also is liable for damage caused by waters escaping from a reservoir as the result of negligence. § 37-87-104(1), 15 C.R.S. (1990). It is essential for purposes of public protection and liability control, therefore, that the reservoir owner carefully monitor the condition of the dams, maintain only that amount of water in storage consistent with safety, and assure that the processes of filling and discharging from the reservoir do not create hazards for reservoir users. These considerations undoubtedly provide the rationale for our long established acceptance of the principle set forth in *Fort Morgan*, 71 Colo. at 262, 206 P. at 395, that reservoir companies have the right to control the water that they have diverted. We conclude as a matter of law that use of Empire Reservoir for recreational purposes by owners of the servient estate is inconsistent with the right of the District under its easement to store water over which it has the right of control and would unreasonably interfere with the exercise of that right.[17]

We believe that a reservoir company's long-recognized right to control stored water, based as it is on the practical considerations in administration and safe storage of this water, militates against recognition of a right

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[17] In reaching this result, we have relied to a great extent on Colorado cases setting forth general principles of the law of easements. The Landowners have argued that federal law, not state law, should be applied. We have discovered nothing to suggest that any federal law applicable to construing the scope of easements granted under the 1891 Act is at variance with the general principles set forth in our own cases.

in the Landowners to make private recreational use of water stored in Empire Reservoir.[18]

D.

The Landowners also rely on *People v. Emmert*, 198 Colo. 137, 597 P.2d 1025 (1979), and *Bergen Ditch & Reservoir Co. v. Barnes*, 683 P.2d 365 (Colo. App. 1984), in support of a conclusion that the District's right of way does not exclude their use of the reservoir for recreational purposes. The Landowners' reliance on these cases is misplaced. *Emmert* recognized that land underlying non-navigable streams is subject to private ownership and that persons floating on a raft across that land without permission of the landowner are guilty of criminal trespass. This result followed from the proposition that "the ownership of the bed of a non-navigable stream vests in the owner the exclusive right of control of everything above the stream bed, subject only to constitutional and statutory limitations, restrictions and regulations." 198 Colo. at 141, 597 P.2d at 1027. In the present case, however, the District has the right to control of water that it has diverted from its natural course incident to exercise of its storage rights. *See* Part IIC of this opinion. The rights of the Landowners, holders of the servient estate,

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[18] The Landowners are asserting private rights, not public rights, and we have no occasion to determine the nature and extent of any public rights that may exist or be created for use of Empire Reservoir. Moreover, neither the State of Colorado nor the Bureau of Land Management is a party to the declaratory judgment action, and any rights to use of the reservoir that might be asserted by these landowners are not at issue in this case.

are limited to conduct consistent with and not unreasonably interfering with the rights of the District as owner of the dominant estate. The facts of appropriation, diversion from the natural stream and right of control of the stored water distinguish this case from *Emmert*.

In *Bergen Ditch* a landowner had granted a reservoir company an easement over private land to overflow and use that land as part of the reservoir. 683 P.2d at 366. The Colorado Court of Appeals concluded that the landowner's successor held a right in common with the reservoir company to make reasonable use of that part of the surface of the reservoir overlying the land burdened by the easement. 683 P.2d at 366-67. That holding followed from the conclusion that the private easement granted to the reservoir company to flood a portion of the landowner's land was nonexclusive. Furthermore, *Bergen Ditch* limited use by the landowner to reasonable use of only that portion of the reservoir overlying his land. In contrast, we have concluded that the private use of Empire Reservoir is inconsistent with the federal grant of a right of way for irrigation to the District. An evaluation of whether *Bergen Ditch* correctly construed the private easement would require review of the evidentiary record, particularly the instrument by which the easement was granted. That record is not before this court. However, *Bergen Ditch*, based as it is on construction of an instrument granting a private easement, is not necessarily contrary to our holding that the Landowners have no right to recreational use of the water stored in Empire Reservoir pursuant to a federal grant.

The considerations leading to recognition of the right of the District to control stored waters are directly related

to assuring that the waters can be safely, effectively and efficiently administered to maximize beneficial use for irrigation purposes, the primary purpose of the federal grant. Accordingly, we hold that the Morgan County District Court erred when it held that the Landowners "have the right to use the surface, in common and in a reasonable manner, with the District."

E.

The Landowners, however, assert that by acquiescence in their historical use of the reservoir the District is now estopped from seeking relief. The brief answer to this contention is that it was not ruled on by the district court. However, the facts found by the district court do not establish the elements of a claim of estoppel.

We have held that the doctrine of estoppel requires more than mere delay. *Manor Vail Condominium Association v. Vail*, 199 Colo. 62, 64, 604 P.2d 1168, 1170 (1980). Estoppel requires " '(1) full knowledge of the facts; (2) unreasonable delay in the assertion of available remedy; and (3) intervening reliance by and prejudice to another.' " *Id.* (quoting *Herald Company v. Seawell*, 472 F.2d 1081 (10th Cir. 1972)). The district court found that the District had knowledge of historical use of the reservoir by the Landowners. The court, however, did not make findings concerning unreasonable delay or prejudice. The findings do indicate increased use and, in particular, increased private commercialization over time – factors important in determining the reasonableness of delay. On this record we can only conclude that the Landowners

failed to make the necessary showing to support a claim for estoppel.

III.

A.

We next consider the challenges to the decree of the water court granting the District's application for a change of water rights to recognize recreational and piscatorial uses of the stored water by the District. The water court held that the District has sufficient power and authority under Colorado law "to operate, maintain and control" the water diverted and stored in Empire Reservoir under its storage decrees for recreational and piscatorial purposes. The court also found that these uses were necessary and incidental to the primary use of irrigation and that the District has devoted and applied the water stored in Empire Reservoir to such incidental uses from the "date of inception" of the storage decrees. The court found that recreational and piscatorial use would result in no enlarged use and that such incidental uses would not cause material injury to other appropriators on the South Platte River. The decree specifies that it does not enlarge the time, method or volume of storage.

The Landowners and others objected to the District's application for recognition of recreational and piscatorial purposes under its storage decrees. On appeal, they assert that the District, under the doctrine of collateral estoppel, was bound by the Morgan County District Court's conclusions in the declaratory judgment action that (1) the District's authority under Colorado law is limited to administration of stored water for irrigation;

and (2) recreational and piscatorial use of the stored water by the District is not within the scope of the subsidiary uses recognized in the 1891 Act. Furthermore, if the District is not precluded by collateral estoppel from obtaining its desired change of water rights, the Landowners challenge the authority of a district organized under the Irrigation Law of 1905 to appropriate and store water for recreational and piscatorial purposes, and assert that the evidence does not support the water court's conclusion that recreational and piscatorial purposes are necessary and incidental uses of the waters stored for irrigation purposes.

A change of water right includes a change in the type of use. § 37-92-103(5), 15 C.R.S. (1990). Implicitly, any such use must be a beneficial use, for appropriation is based on application of waters of the state to beneficial use. § 37-92-103(3)(a), 15 C.R.S. (1990). Impoundment of water "for recreational purposes, including fishery or wildlife" is a beneficial use. § 37-92-103(4), 15 C.R.S. (1990). We believe, however, that unless the owner of a water right can legally put water to a particular new use, the use cannot be recognized as beneficial. *Cf. Colorado River Water Conservation District v. Vidler Tunnel Water Company*, 197 Colo. 413, 594 P.2d 566 (1979) (intent to appropriate cannot be recognized unless the purported appropriator has an intent to apply water to beneficial use itself or legally represents others committed to make such actual beneficial use). In the present case, the District wishes to put the water stored from time to time in Empire Reservoir to private use for recreational and piscatorial purposes. Such a use at that location, however,

would exceed the scope of its easement granted by the United States in 1907.

The Act of May 11, 1898, listed three specific uses of canal and reservoir rights of way: water transportation, domestic purposes, and development of power, each "subsidiary to the main purpose of irrigation." Ch. 292, § 2, 30 Stat. 404. In addition it authorized rights of way "for purposes of a public nature." Ch. 292, § 2, 30 Stat. 404. This public purposes authorization is also subject to the dominant purpose of irrigation. *Kern River Co.*, 257 U.S. at 153. The statute makes no provision for a private use other than the ones specifically mentioned. *See* Act of March 3, 1891, ch. 561, § 21, 26 Stat. 1102;[19] *Zelph S. Calder*, 16 IBLA 27, 81 I.D. 339, 345 (1974) (Act of May 11, 1898, does not authorize private uses for stock watering or fish culture). Accordingly, for the District to make such uses of the stored water would overburden the easement and would intrude on the rights of the Landowners as owners of the servient estate. Under these circumstances, we believe that the District was precluded from obtaining a change of its water storage rights in Empire Reservoir

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[19] The cited statute, as now codified at 43 U.S.C. § 949 (1988), provides:

> Nothing in sections 946 to 949 of this title shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch.

This provision has been construed to apply to reservoirs as well as canals and ditches. *Zelph S. v. Calder*, 16 IBLA 27, 81 I.D. 339, 345 (1974).

to recognize the additional and incidental use of the water for recreational and piscatorial purposes. For this reason, we reverse the judgment of the water court recognizing a right in the District to apply the stored water to these uses.[20]

Our disposition of the issue makes it unnecessary to determine whether an irrigation district organized under the Irrigation Law of 1905 has the authority to appropriate water for recreational and piscatorial use incident to an appropriation for the primary purpose of irrigation. It

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[20] No challenge has been raised to the standing of the Landowners to object to the District's application for change of water rights. The Landowners do not assert injury to any water rights of their own. *See* § 37-92-305(3), 15 C.R.S. (1990) (an application for a change of water right shall be approved "if such change . . . will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right."). Where, as here, objectors such as the Landowners assert that the owner of the water right cannot make the requested uses without impermissibly burdening the objector's own legal rights, we conclude that general principles of standing authorize the objectors to raise that limited challenge to the application. *See Wimberly v. Ettenberg*, 194 Colo. 163, 168, 570 P.2d 535, 539 (1977) (standing requires injury in fact to a legally protected interest); *accord, e.g., Maurer v. Young Life*, 779 P.2d 1317, 1323 (Colo. 1989); *O'Bryant v. Public Utilities Commission*, 778 P.2d 648, 652-53 (Colo. 1989). We also conclude that the issue was adequately presented to the water court by introduction of the Morgan County District Court's judgment in the declaratory judgment action in which the court noted that to declare that the District has exclusive authority to use Empire Reservoir for recreational and piscatorial purposes "appears contrary to the subsidiary use recognized in 43 U.S.C. § 951 [codifying relevant provisions of the Act of May 11, 1898]."

is also unnecessary to determine the merit of the objectors' collateral estoppel contentions or its argument that the evidence does not support the recognition of use of the District's storage right for these incidental purposes.

B.

The District cross-appealed the judgment in the water court action to challenge the water court's statement that "[n]othing in this decree shall be deemed to [affect] any concurrent non-exclusive right which the underlying land owners may have to make use of the surface of the reservoir, or any part thereof, for recreational or piscatorial purposes." This language does not purport to create any right in the Landowners. Any suggestion that the Landowners may have such rights is inconsistent with our holding in the portion of this opinion relating to the declaratory judgment action, and we disapprove any such suggestion.

IV.

We affirm the judgment of the Morgan County District Court in the declaratory judgment action to the extent that it holds that the District owns an easement rather than a limited fee for the operation and maintenance of Empire Reservoir. We reverse the judgment of that court to the extent that it holds that either the District or the Landowners have rights to make private use of the stored water for recreational and piscatorial purposes. We remand the declaratory judgment action to the district court for entry of a decree consistent with the views expressed in this opinion.

We reverse the judgment of the water court granting a change of water rights to recognize a right in the District to make incidental use of its storage decrees for recreational and piscatorial purposes.

APPENDIX 2

DISTRICT COURT, MORGAN COUNTY, COLORADO
Case No. 83 CV 132

JUDGMENT and DECREE

BIJOU IRRIGATION DISTRICT,
Plaintiff,

vs.

THE EMPIRE CLUB, A General Partnership; ERVIN I. MICHAELSON and JOHN ROTH (Lease Purchase from Ervin I. Michaelson); ROSE IREME [sic] CAMPBELL and STEPHEN CAMPBELL; B. J. PEGGRAM and FRANCES E. PEGGRAM; TERRY CHAPMAN and CONNIE CHAPMAN; CHARLES B. RUMSEY; RAY C. PETERSON and VIOLET I. PETERSON; LEE D. THOMPSON; HARRY KOHLER; ROBERT L. WALTNER; CAROL J. WALTNER and RAYMOND R. RICHARDSON and ALL UNKNOWN PARTIES WHO CLAIM ANY INTEREST IN THE SUBJECT MATTER OF THIS ACTION,
Defendants.

(Filed APR 23 1987)

COMES NOW THE COURT, after trial and arguments, enters the following FINDINGS, CONCLUSIONS, JUDGMENT and DECREE:

I. GENERAL OVERVIEW.

Peterson's Exhibit 14, a map, graphically portrays the competing private and public interests in the parcels of land which underlie and surround Empire Reservoir (Reservoir). The Reservoir is landlocked by private and

public land. The private and public lands extend underneath the Resrvoir [sic]. A substantial amount of the land, which underlies the Reservoir, is B.L.M. and Colorado State land. The Bijou Irrigation District (District) owns a very small portion of land beneath and abutting the Reservoir.

For years, private landowners have individually used the Reservoir water for recreational activities. Some private landowners have commercialized their property by selling club memberships. The District has done the same thing. Although there is a substantial amount of state and federal land, the general public has not been able to readily use the Reservoir for water recreation. The recreational use of the water has not deprived the farmers, included in the irrigation district, from obtaining the quality and quantity of water to which they are entitled.

II. SPECIFIC FINDINGS.

1. Plaintiff, the District, a municipal corporation, was organized pursuant to Colorado Revised Statutes (C.R.S.) 37-41-101, the Irrigation District Law of 1905. The District came into existence by order of the county commissioners on April 12, 1905, and has been continuously active since 1907.

2. The Bijou Irrigation System is composed of the District and the Bijou Irrigation Company. The District appropriates and stores water in the Reservoir. The Bijou Irrigation Company delivers the water through a system of canals. The District pays the Bijou Irrigation Company running fees for using the company's canals. The District's authority terminates at the Bijou Canal.

3. The Reservoir is located in Weld County, Colorado, upon Sections 25, 26, 35, 36, Township 4 North, Range 61 West, and Sections 1, 2, 12, Township 3 North, Range 61 West; and in Morgan County, Colorado, upon Sections 31 and 30, Township 4 North, Range 60 West, and Sections 6 and 7, Township 3 North, Range 60 West of the 6th P.M..

4. The source of the water stored in the Reservoir is from the South Platte River in Weld County. The Reservoir is gravity fed and supplies water for approximately 19,000 acres of arid northeastern Colorado farm land. Approximately 200 farmers benefit from this supply of water.

5. The District, limited by the availability of water, certain adjudicated wat [sic] decrees and safety restrictions, determines how much water they will divert for storage. The District, governed by statutory and contractual obligations, then decides when and how much water will be released to the farmers included for service in the irrigation district. The District's adjudicated water rights, which are not in issue, are summarized in Plaintiff's Exhibit J.

6. By agreement of the parties, the District acquired its interest in the Reservoir by virtue of a grant from the United States. 43 USC § 946. This federal statute codifies the earlier Act of March 3, 1891.

7. 43 USC § 946 is entitled "Rights of Way and Other Easements in Public Lands". Section 946 granted rights of way through public lands and reservations of the United States to construct, maintain and operate reservoirs for the purpose of irrigation. The grant, by federal

statute, authorized a right of way and 50 feet on each side of the marginal limits for operation and maintenance of the reservoir.

8. The main purpose for the federal reservoir grant, pursuant to federal statute and consistent with the historical background of arid states, was for irrigation. According to C.R.S. 37-41-101, Irrigation District Law of 1905, the establishment of the District was for irrigation purposes.

9. On January 19, 1906, the District acquired a quit claim deed from Charles F. Tew, John T. Warren and L. L. Stimson. The grantee, based upon the legal description given therein, conveyed whatever interests, title and rights they had in the reservoir site, basin and canals. Plaintiff's Exhibit HH.

10. On May 9, 1907, the District received the reservoir grant from the Secretary of the Interior.

11. In 1915, a Statement of Claim to Water Right was filed in Weld County. Said claim evidences an intent to initiate appropriation of water. Those documents, although recorded, acquired no greater right or interest than those which were acquired pursuant to law, which created the District, or federal law, which granted the reservoir site. Plaintiff's Exhibits F and G.

12. On March 7, 1944, the State of Colorado, through the Colorado State Board of Land Commissioners, granted right of way No.857 to the District. Tract 1 of the granted right of way was upon the surface of Section

36, Township 4 North. Range 61 West, for reservoir purposes. However, Colorado reserved all mineral interests. Plaintiff's Exhibit H.

According to Plaintiff's Exhibit H, the District agreed to maintain and keep the right of way in repair and in compliance with all laws of the State of Colorado so as to prevent injuries to persons and property. This provision is simply a restatement of the statutory responsibilities set out in C.R.S. 37-87-104.

13. On November 19, 1982, Defendant Empire Club received fee title to certain property underlying and abutting the Reservoir. Approximately one-third of their property underlies the Reservoir. The warranty deed contains an exception for easements and rights of way of record. Defendant's Exhibit E-2.

14. On February 28, 1964, the United States conveyed, by grant, certain described lands to the Colorado Game, Fish and Parks Commission for recreational purposes subject to the Reservoir. A substantial portion of that land underlies the Reservoir. Peterson's Exhibit 13.

15. Defendant Peterson has two separate parcels of land conveyed by separate deeds. A warranty deed, dated March 21, 1975, conveys land abutting and underlying the Reservoir. Said deed is subject to easements and rights of way of record. Almost one-third of that parcel is under water. Peterson's Exhibit 15.

16. On April 10, 1973, Mr. Ervin I. Michaelson received, by warranty deed, property abutting and underlying the Reservoir. This deed is subject to the

District's easement. Presently, three-fourths of his land is under water. Defendant's Exhibit 18.

17. On May 15, 1974, Defendant Kohler received an undivided two-thirds interest by quit claim deed, for land abutting and underlying the Reservoir without exceptions. Defendant's Exhibit 14.

18. On April 14, 1972, Robert L. and Carrol J. Waltner received, by quit claim deed, lands underlying and abutting the Reservoir without exceptions. Defendant's Exhibit 15.

19. On August 16, 1985, by public trustee's deed, certain described property therein was conveyed to Gordon A. and Betty D. Price which abuts the Reservoir without exceptions. Defendant's Exhibit 19.

20. On February 9, 1977, personal representative's deeds were executed conveying certain property abutting and underlying the Reservoir to Lee D. and Monzelle Thompson as tenants in common. All property conveyed was subject to the right of way for the Reservoir.

21. On April 17, 1984, Defendant Rumsey received a one-third interest, by quit claim deed, for properties abutting and underlying the Reservoir. Defendant's Exhibit 17.

22. The District reached a stipulation with the State of Colorado concerning certain lands underlying and abutting the Reservoir. The District Admitted that the State of Colorado owns fee title to all State land. Furthermore, the District agreed not to seek relief which would adversely affect the interests of the State of Colorado to

any real estate or property rights in regards to the subject matter of this action. Plaintiff's Exhibit MM.

23. There are approximately 12 access routes to the Reservoir, including county roads. Most access roads, particularly the county roads, are blocked with locked gates and lead to private property. Four of the acces [sic] roads go directly to the Reservoir.

24. An easement was awarded to the District for the Construction of an access road to the Reservoir. Plaintiff's Exhibit O. There is an access road on the east side from Highway #144; one on the southeast side for the Empire Club; one off of I-76 on the south side of the Reservoir; and one on the west side of the Reservoir for the District. The east side access road terminates adjacent to the State property which abuts the Reservoir on the east side.

25. The District initially complained of trespassers in 1971, however, no one was identified. Plaintiff's Exhibit Y. If the District was complaining about surrounding landowners, surely, there would have been no problem in such a general identification.

26. In June, 1978, Defendant Kohler was specifically identified as a trespasser. The District expressed concern about his boat club. Plaintiff's Exhibit Z. No other individual landowners were identified. Subsequently, in 1979, the District pursued civil trespass allegations against Mr. Kohler. He was the only private landowner in that case.

27. The 1979 Complaint was filed in Weld County District Court, 79 CV 374, alleging a trespass against Mr. Kohler. On November 13, 1981, after arguments of counsel, Judge Behrman dismissed the case with prejudice.

This court was not provided with any of the court's findings of fact which were announced from the bench. In a Motion for Summary Judgment, the District claimed ownership only in the water. Defendant's Exhibit 30.

28. Subsequently, "No Trespassing" signs were placed on the south side only. This was in the vicinity of Mr. Kohler's property.

29. On March 19, 1981, the District filed a condemnation action, 81 CV 254, in Weld County District Court. The only property described was owned by Defendants Kohler and Mr. Waltner. According to the Complaint, the District was attempting to obtain fee simple title to property that the District now claim a limited fee in. In paragraph 3 of the Complaint, the District claimed the power, and rightfully so, to condemn land tc obtain fee simple for the purpose of constructing, operating and maintaining a reservoir. Defendant's Exhibit 31.

According to the registry of the court, the District failed to appear for the trial on December 2, 1982. However, defendants' counsel informed the court that a Motion to Dismiss would be filed. On December 3, 1982, the Motion to Dismiss Without Prejudice was filed by the District. The main basis for dismissal, according to the District's motion, was a potential and unacceptable award of a market value greater than $10,000.00.

30. This present case was filed in 1983. Also, the District filed a lis pendens against all of the defendants' property in this action.

31. On August 7, 1984, Defendant Michaelson obtained a decree quieting title to certain property

described therein. Defendant's Exhibit 22. This property is the subject of the deed set out in Defendant's Exhibit 18. The District was never named as a party nor served with the petition. This court, which awarded that decree based upon the parties involved, is satisfied that it has no effect as to the District in this present action.

32. In 1985, a letter was sent to Mr. Roth concerning his club members riding motorcycles on the dike. The District's sole complaint was the use of the dikes. Plaintiff's Exhibit X.

33. As late as 1985, Mr. Tomky described the District's interest in the Reservoir as only an easement. Defendant's Exhibit 6.

34. On March 3, 1986, letters were sent to all landowners identifying them as trespassers. In 1986, thirteen "No Trespassing" signs were errected [sic] around the Reservoir.

35. The Reservoir has been used since its existence by private landowners and a small amount of the public. Since the fifties the water has been used for boating, water skiing, hunting and general recreation. According to the evidence, fishing is nonexistent unless Carp is your forte'. It appears to the Court that all of these activities coexisted without interference to the management of the Reservoir.

36. The District, until recently, has not complained about the landowners' use of the surface of the water. According to Plaintiff's staff and maintenance crew, people were observed, without objection, using the water for

recreational purposes. The general public was even permitted to gain access to the water through public property on the east side of the Reservoir site for swimming and hunting.

37. Mr. Tomky, President of the Bijou Irrigation District, had previously assured the Regional Wildlife Manager, Colorado Division of Wildlife, that the land which they were trying to purchase, underlying the Reservoir, would continue to be used for public recreation and conservation. Defendant's Exhibit 9.

38. According to Defendant Michaelson, who purchased his land in 1973, the prior purchaser had used the Reservoir for recreational purposes. He was never told that he could not use it for recreational purposes until the filing of this action.

39. Some private landowners are selling memberships ranging from $50.00 to $295.00 per family per year. Defendant Michaelson has rented his property for over five years for that purpose. He claims he received approval from Mr. John W. Samples, Secretary of the District. It was not until 1983 that he was notified he could not use it for that purpose.

Defendant Kohler also sells memberships to the public. He charges $295.00 per year and has 42 memebers [sic]. They use the surface of the water for boating, swimming, skiing and hunting. He recalls using the surface of the Reservoir for recreational purposes since 1959.

40. Defendant Peterson and her husband purchased proprty [sic] abutting and underlying the Reservoir in 1975. Since 1957, her family has continuously used the

Reservoir without complaint, however, she does not sell memberships. She was not advised that she was a trespasser until the filing of this action.

41. According to Defendant Thompson, in 1975, Mr. John W. Samples advised the landowners that they could use the Reservoir. The first time that he was informed he could not use it was after the filing of this action.

42. According to Mr. Weber, the Maintenance Superintendent for the District, it has been the District's practice simply to guide people back to their appropriate area for swimming or boating if they are found on any of the dike roads. This included the average citizen and club members.

43. The District, itself, leases to private clubs for the recreational use of the Reservoir. One club, The Morgan Recreation Club, has been in existence for approximately five years. The District collects fees of approximately $5,500.00 per year. Leases also exist to a variety of hunting clubs for a fee. However, there are no rules regulating who may apply for such lease from the District.

44. Private Landowners have not been shown to have physically interferred [sic] with the maintenance of the Reservoir. No one really knows who does the small amount of damage by removing riprap. However, this riprap is easily replaced. According to the District's own witnesses, the defendants' use of the Reservoir has never prevented or impeded the District from storing or delivering the needed quantity or quality of water to the District members.

45. After the filing of this action, a meeting took place between the District's attorney, some of the District's staff, and most of the defendants in this action. The purpose of the meeting was to inform the individual defendants that it was not the desire of the District to prohibit them from using the surface of the water. It was the District's desire to preclude private commercialization by certain private landowners.

46. The amount of expenses incurred for the production of 13 "No Trepass [sic]" signs and labor for their installation was approximately $1,500.00. No monetary value was ever proven for any trespass damage.

47. The Reservoir is surrounded by maintenance roads which are used by the District's maintenance crew. There are several earth dams which surround the Reservoir. On the south side is the largest earth dam which has an access road over it. This road is not for general vehicular traffic use.

48. According to Mr. Robert Samples, Regional Water Commissioner for the Colorado State Engineer's Office, the Reservoir dams are classified as Number One. This means that the dams are high hazard. The dams are earth filled and have been in existence since the Reservoir's construction. The earth portions are protected by trees and riprap. The loss of riprap can be due to natural, manmade and animal reasons.

The Reservoir has experienced one washout in 1907. The District has allowed The Morgan Recreation Club members to use the 1907 washout area for recreational purposes.

Because the dams are not up to standards, the water is limited to a gauge height of 29 feet. To allow an additional one foot of water would require a substantial economic burden. The District has made a decision not to pursue that economic burden. Mr. Tomky confirmed that the additional one foot of water is unnecessary.

49. On October 5, 1984, Defendant Peggrams reached a stipulation with the District. The Peggrams never appeared in court, and the court was never able to inquire of them concerning this agreement. Their attorney, Mr. Hellerich, was representing them at the time this stipulation was reached, however, he was never a part of the stipulation. Paragraph 2 of the stipulation states Mr. Hellerich will withdraw and appropriate documentation would be secured. That never occurred and the court has not received such documentation.

III. ISSUES.

This court will limit the issues it plans to resolve. The court feels those limitations are necessary because a judgment or decree would not terminate the uncertainty giving rise to this trial. This is accentuated by the stipulation reached between the Plaintiff and the State of Colorado. Rule 57(f), C.R.C.P.. As the court has earlier ruled, some issues are "water matters" and this court is without jurisdiction. Furthermore, much of the relief argued for does not appear in any pleadings. Those issues the court will resolve are:

1. Is the District's interest in the Reservoir site a limited fee entitling them to the exclusive possession and use of the Reservoir site and water thereon?

2. Is the District entitled to a decree quieting title in the Reservoir site, including 50 feet above the marginal limits?

3. Is the District entitled to a decree quieting title allowing them the exclusive use for recreational and piscatorial purposes?

4. What interest do defendants have in lands underlying or abutting the Reservoir?

5. Do defendants have the right to use the surface of the Reservoir water?

6. Have the defendants trespassed?

IV CONCLUSIONS.

1. There is no one case that stands on all fours for the propositions facing this court. The decisions cited to this court include criminal, railroad and reservoir cases. Those cases have the common theme dealing with problems between different landowners and interpreting the grant from the United States. All counsels have done an admirable job of representing their respective clients.

This is not a case involving an action for a nuisance. No claim has been presented to this court that any party is making a nuisance of themselves or making an unreasonable use of the Reservoir. What is requested of the court is an interpretation of the rights acquired from deeds, state and federal laws. Finally, no claim has been presented that any farmer, entitled to water from the District, has been deprived of such water either in quantity or quality.

2. Clesson S. Kinney, *Kinney on Irrigation and Water Rights*, 2nd Ed., Vo1.2, partially defines a water right as a legal right to use water appropriated according to law from sources within a state for certain beneficial purposes. Colorado decisions support that definition. Additionally, a water right is a species of property independent of the Reservoir site.

3. Appropriation, as contrasted with riparian, is a doctrine of separate ownership as between the land and the water. Title may be had as to the water without holding title to ownership of land. Water is personal property once it is diverted and contained within an artificial receptacle. It then can be the subject of larceny or malicious mischief. Once the water is captured it becomes an corporeal hereditament.

4. Pursuant to 43 USC § 946, the District received a grant for a reservoir from the United States. The statutory grant was a right of way and includes 50 feet on each side of the marginal limits of the reservoir. The right of way was for the main purpose of irrigation. *Kern River Co. v. U.S.*, 257 US 147, 42 S.Ct. 60 (1921). The reservoir site is inseparable from the land upon which it sets. The reservoir site exist [sic] because of the natural configuration of the land, except for the earth dams and dikes.

Plaintiff secured approval for the Reservoir from the Secretary of the Interior on May 9, 1907. That grant vested on the approval date and had the effect of a patent. *Johnson Irr. Co. v. Ivory, et al.*, 24 P.2d 1053, 1055 (Wy. 1933); Zelph S. Calder (1974) 811 ID 339. The grant vested a right of way in the Plaintiff to construct, operate

and maintain a reservoir for the main purpose of irrigation. However, other subsidiary uses were authorized if it did not dimish the quantity and quality of water available for irrigation purposes. *Kern*, supra. Those subsidiary uses now appear in 43 USC § 951. The relevant subsidiary use, if authorized in this case, based upon the claims of the District, would have to be for a public nature.

5. The parties agreed that the District, as a municipal corporation, was lawfully organized pursuant to C.R.S. 37-41-101. The description of the District must be filed with the County Clerk and Recorder. Such lawful organization is required before a grant from the United States could be made for a reservoir. Therefore, this court is satisfied that all parties had sufficient notice of the existence of the Reservoir. As such, and like a majority of the deeds reflect, all defendants took subject to that right of way.

6. Federal law permits a reservoir to be used for public purposes, however, those subsidiary uses are not recognized as the purpose of an irrigation district by the State of Colorado. C.R.S. 37-41-101 restricts irrigation districts to irrigation purposes. Each district has only such powers conferred by statute. The objective of the law was to bring into cultivation the arid lands of this state. *Anderson v. Grand Valley Irr. Dist.*, 35 Colo. 525, 85 P. 313 (1906).

7. C.R.S. 37-41-113 outlines the powers of the board of directors. Summarized, those duties involve the establishment of rules and regulations for the distribution of water among the landowners included within an irrigation district. Also, the power is granted to pursue matters

involving business affairs, condemnation, construction, maintenance and operation of the delivery and distribution system. The board of directors shall perform all acts necessary to carry out the purpose of the statute.

8. The board of directors, " . . . has power to lease or rent the use of water . . . to occupants of other lands . . . on such terms as it deems best . . . " C.R.S. 37-41-113(7). That power is limited to irrigational uses as one can interpret from the content of (7). No power or authority has been granted by the legislature to the irrigation district to conduct a private recreational business.

9. The District is attempting to have the court declare a right in the District for the exclusive authority to use the Reservoir for purposes of recreational and piscatorial purposes. The District is attempting to become the exclusive leasing authority and to prevent private landowners from using water above their land without their consent. The same rationale to exclude the private landowners would necessarily apply to the general public using state or federal land. The end result would require all persons to negotiate contracts with the District for recreational activities. The court cannot find such legislative authorization in the state irrigation statutes. Additionally, this appears contrary to the subsidiary use recognized in 43 USC § 951. Such a declaration would be contrary to the stipulation entered into between the State of Colorado and the Plaintiff. If such additional powers are to be conferred, it should be a legislative decision and not a trial court's strained interpretation of a statute.

10. This court is not authorized to declare, as an alternative, a beneficial use not granted by a water

decree. C.R.S. 37-92-103, Water Right Determination and Administration, defines beneficial use as including the use of water for recreational and fishery purposes. A change of a water right includes a change in the type of use. Appropriation means the application of a certain portion of the waters of the state for a beneficial use.

11. A district court can adjudicate disputes over *ownership* of water rights. However, the District has not acquired a water decree for the beneficial use of water for recreational or piscatorial purposes. Determination of water rights are "water matters" and water judges have exclusive jurisdiction. *Humphrey v. Southwestern Develop. Co.*, 85SC325, BT Vol.XI, Issue 14, page 428.

12. The U.S. Supreme Court in *Kern* interpreted the right of way granted by the U.S. Government, according to the Act of March 3, 1891, as a limited fee. However, the *Kern* decision was decided on November 21, 1921.

13. On February 2, 1942, the U.S. Supreme Court announced *Great Northern RR. Co. v. U.S.*, 315 US 262, 86 L Ed. 836. The issue in that case was whether or not the petitioner had any right to the oil and minerals underlying its right of way which was acquired by a grant from the United States. The U.S. Supreme Court concluded that the grant was only an easement and not a fee. Also, the U.S. Supreme Court concluded that the right of way granted is one of use and occupancy and not the land itself. The statute interpreted by the U.S. Supreme Court in *Great Northern* is similar to the statute in this case.

The same significant language appearing before the U.S. Supreme Court appears before this court. That significant language is, " . . . and thereafter all such lands

over which such rights of way *shall pass* shall be *disposed subject to such right of way.*" 43 USC § 947. This language, in the U.S. Supreme Court's opinion, is inconsistent with the grant of a limited fee. In their opinion the intent of the statute was to convey an easement. This conclusion is consistent with the statute's legislative history.

14. Grants by the U.S. must be strictly construed in favor of the government. Nothing is to pass but that which is conveyed by clear and explicit language of the statute. Any inferences must be resolved in favor of the government. *Caldwell v. U.S.*, 250 US 14, 39 S. Ct. 397 (1919).

15. The U.S. Supreme Court specifically noted that subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject. Also, they gave great weight to the administrative interpretation given by the agency required to administer the program.

16. The U.S. Supreme Court disapproved of the language used in *Rio Grande Western RR. Co. v. Stringham*, 239 US 44, 36 S. Ct. Rep. 5. This case influenced the *Kern* decision. The Court stated, "We do not regard this subsequent interpretation as binding on the Department of the Interior since it was impelled by what we regard as inaccurate statements in the Stringham Case." 86 L Ed. 843.

17. On August 8, 1985, the Montana Supreme Court decided *E. E. Eggebrecht, Inc. v. Waters*, 704 P.2d 422 (1985). This case dealt with the nonuse of a reservoir. Mr.

Waters acquired a reservoir right of way from his predecessor in title pursuant to 43 USC § 946. Mr. Eggebrecht, a farmer, had land underlying the reservoir right of way.

Like this court, the Montana Supreme Court found a great deal of confusion over the nature of the reservoir right of way that was graned to Waters' predecessor in interest under the March 3, 1891 Act. This confusion was of course due to the *Kern* and *Great Northern* cases. They noted that the *Kern River* decision was relying on the *Stringham* decision. The concept of a limited fee was a carryover from the railroad rights of way. The Court noted, as this court has, that the U.S. Supreme Court in *Great Northern* criticized the use of that limited fee. The Court concluded at page 425, " . . . the reservoir right of way in question can safely be characterized as an easement . . . "

19. This court has found the same line of decisions in Colorado. The Colorado Constitution, Article XVI, Section 5, vests ownership of all waters in the State of Colorado in the public. The water is dedicated to the perpetural [sic] use of the people. *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582 (1887).

20. The Colorado Supreme Court determined in *Wheeler* that ownership of water, if unappropriated, is for the perpetual use of the people. Ownership is vested in the public. After appropriation, the title remains in the public with a paramount right to use by the appropriator. The appropriator does not become the proprietor of the water.

21. In 1893, the Colorado Supreme Court confirmed their earlier position in *Wyatt, et al. v. Larimer & Weld Irr.*

Co, et al., 18 Colo. 298, 33 P. 144. The Court concluded that a canal company is an intermediate agency existing for the purpose of aiding the customers. The *Wyatt* case concluded that the canal company is not the proprietor of the water diverted. This same rationale applies equally as well to a reservoir storage site.

22. In 1979, the Colorado Supreme Court announced *People v. Emmert*, 597 P.2d 1025. This case was a criminal trespass case dealing with non-navagable waters. The Court supported the common law concept that he who owns the surface has an exclusive right to everything above. C.R.S. 41-1-107 supports that proposition. The Colorado Constitution was historically concerned with appropriation but did not intend to subvert common law rights of landowners.

23. *Emmert*, in footnote 3, referred to *Snively v. Jaber*, 296 P.2d 1015 (Wash. 1956). *Snively* involved a non-navigable lake. A resort used a lake with the landowners who owned land underneath and abutting the lake. The Washington Supreme Court concluded that rights and privileges were owned in common and that any appropriator or licensee may use the entire surface so long as he does not interfere with the similar rights of others. Both *Snively* and *Emmert* point out that it was a legislative prerogative to change common law.

24. On July 7, 1986, the Colorado Supreme Court announced *Hutson v. Agri. Ditch & Reservoir Co.*, 723 P.2d 736 (Colo. 1986). The Court granted cert in this case to determine whether an interest in a 40 foot strip of land, acquired in a condemnation proceedings in 1876, was a limited fee or an easement. The condemnation decree had

awarded the Agricultural Ditch & Reservoir Company a limited fee title to the property. However, the Court concluded that the decree vested the ditch company with an easement and not a limited fee. Quoting from the American Law of Property, the Court stated:

> A possessory interest [fee], as contrasted with an incorporeal interest, involves the exclusive possession of certain space. Hence its creation requires the designation of the space to be occupied. An easement authorizes the limited use of land within space occupied by another. Its nature does not require the precise description of that space which the creation of a possessory interest does.
>
> When a conveyance creates the right to use certain land but the conveyance is not sufficiently precise to create a possessory interest, the interest created, if one is created, is necessarily an easement.

The Colorado Supreme Court stated, "In the absence of additional descriptive language, 'right-of-way' when used to describe an ownership interest in real property, is traditionally construed to be an easement."

25. Furthermore, this court is satisfied that a limited fee was not granted to the District by review of Plaintiff's Exhibit PP. Plaintiff's Exhibit PP, a patent, conveys a fee to Emiel O. Schreck, which land is now owned by Defendant Michaelson. You cannot have two fees to the same tract of land, whether described as base fee, determinable fee, qualified fee or limited fee. 28 Am. Jr. 2d, Estates, § 10.

26. On May 10, 1984, the Colorado Court of Appeals announced *Bergen Ditch & Reservoir Co. v. Barnes*, 683 P.2d

365. The Court of Appeals concluded in that case that the person who owns the surface of the ground has exclusive right to everything above it. C.R.S. 41-1-107. Furthermore, the Court said:

> An easement by its nature, although distinctive from ownership, is an interest in land. Unless the grant conveying an easement specifically characterizes the easement as 'exclusive', the grantor of the easement retains the right to use the property in common with the grantee.

Landowners share a right to reasonably use the surface of a reservoir which overflows their property. The landowners retain the right to use the property in common with the reservoir company.

27. Following the rationale set out in the more recent cases by the U.S. Supreme Court and the Colorado Supreme Court, it would appear that the grant set out in 43 USC § 946 is an easement. The easement, a right or privilege, was not exclusive. Therefore, the other landowners, with land abutting and underlying the Reservoir, have a right to use the surface in common and in a reasonable manner with the irrigation company.

28. Liability insurance is not a determining factor of what interest one holds in relationship to property. Liability, as it relates to the irrigation company, is a legislative issue. One's interest in land is a question of title.

29. Based upon Plaintiff's lack of a possessory interest in the real estate and conflicting trespass evidence, the court does not find a trespass by the defendants. Additionally, the defendants are entitled to reasonable use of

the water based upon the cases relied upon in this decision. The proper action, when the use becomes unreasonable, is injunctive relief, provided no adequate rememdy [sic] at law exist. The Plaintiff have [sic] made no showing that the use is unreasonable with the landowners. To the contrary, the Plaintiff has argued that *any use* is prohibited without their approval.

30. Plaintiff has not shown that they have acquired ownership of the property in question by adverse possession. The District's possession has been mere occupancy and not exclusive. *Concord Corp. v. Huff*, 144 Colo. 72, 355 P.2d 73 (1960); *Lovejoy v. School Dist. No. 46*, 129 Colo. 306, 269 P.2d 1067 (1954). The District has not shown exclusive possession as evidenced from the results of their previous conduct and legal actions. The District has recently recognized title in the land by the private landowners as well as the State of Colorado. *Segelke v. Atkins*, 144 Colo. 558, 357 P.2d 636 (1960). There appears, in this case, to be common possession, therefore, no title by adverse possession can be had against the person holding legal title. *Dzuris v. Kucharik*, 164 Colo. 7, 458 P.2d 756 (1967).

THE COURT ORDERS, ADJUDGES, DECLARES AND DECREES the following:

1. The District possess [sic] a reservoir easement, by grant, to include 50 foot easement above the marginal limits of the Reservoir. No survey was provided to the court, therefore, no more specificity can be deliniated.

2. The District does not have the exclusive use of the Reservoir for recreational and piscatorial purposes.

3. Defendants, who have land abutting and underlying the Reservoir, have the right to use the surface, in common and in a reasonable manner, with the District.

FURTHERMORE, THE COURT ADJUDGES that Defendants have not been shown to be trespassers by a preponderance of the evidence.

FURTHERMORE, THE COURT ADJUDGES that costs be awarded to the Defendants in this action and attorneys' fees are denied to all parties. Defendants shall file their bills of cost within 15 days hereof. Plaintiff will have 10 days within which to object. If no objection is filed, the costs will become an Order of the Court.

THE COURT FURTHER ORDERS that this matter be set down for trial on Defendant Peterson's counterclaim.

DONE this 23 day of April, 1987.

BY THE COURT:

/s/ Joseph J. Weatherby
JOSEPH J. WEATHERBY
District Judge

APPENDIX 3

Supreme Court of Colorado

STATE JUDICIAL BUILDING
2 EAST 14TH AVENUE
DENVER, COLORADO 80203
(303)861-1111

MAC V. DANFORD
CLERK OF COURT

SUSAN J. FESTAG
CHIEF DEPUTY CLERK

February 4, 1991

89SA302 *Bijou Irrigation District v. The Empire Club*
89SA209

Please substitute the attached pages 22-31 with the like pages of the opinion announced on January 14, 1991.

The opinion was modified, and as modified, the Petition for Rehearing was denied.

The modifications follow:

–page 22, line 10 from the top, the addition of footnote 17:

> 17 In reaching this result, we have relied to a great extent on Colorado cases setting forth general principles of the law of easements. The Landowners have argued that federal law, not state law, should be applied. We have discovered nothing to suggest that any federal law applicable to construing the scope of easements granted under the 1891 Act is at variance with the general principles set forth in our own cases.

–the remaining footnotes were renumbered accordingly;

–pages 23-31, merely a shift in text to accommodate the addition of footnote 17; no changes in text.

MAC V. DANFORD
Clerk of the Supreme Court

/s/ Jayne L Koepke
Deputy Clerk

APPENDIX 4

SUPREME COURT, STATE OF COLORADO
CASE NO. 89SA302
TRANSFER FROM THE COLORADO COURT OF APPEALS, 87CA1232
APPEAL FROM THE DISTRICT COURT, MORGAN COUNTY, 83CV132

ORDER OF COURT

BIJOU IRRIGATION DISTRICT,

Plaintiff-Appellant,

vs.

THE EMPIRE CLUB, a General Partnership; ERVIN L. MICHAELSON and JOHN ROTH (Lease Purchase from Ervin L. Michaelson); ROSE IRENE CAMPBELL and STEPHEN CAMPBELL; B.F. PEGGRAM and FRANCIS E. PEGGRAM; TERRY CHAPMAN and CONNIE CHAPMAN; CHARLES B. RUMSEY; RAY C. PETERSON and VIOLET L. PETERSON; LEE D. THOMPSON; HARRY KOHLER; ROBERT L. WALTNER; CAROL L. WALTNER and RAYMONT [sic] R. RICHARDSON and ALL UNKNOWN PARTIES WHO CLAIM ANY INTEREST IN THE SUBJECT MATTER OF THIS ACTION,

Defendants-Appellees.

Upon consideration of the Motion to Recall of Mandate filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that the Mandate is Recalled, and that its reissuance is STAYED for a period of thirty (30) days. Any further stays must be sought in the U.S. Supreme Court.

BY THE COURT, FEBRUARY 27, 1991. (Seal)

APPENDIX 5

TEXT OF PETITION FOR REHEARING

The Empire Club, Ervin L. Michaelson, John Roth, Charles B. Rumsey, Violet L. Peterson, Lee D. Thompson, Raymond R. Richardson, Gordon A. Price and Betty B. Price ("Landowners") petition for rehearing. The Landowners submit that the Court erred when it construed a grant of a United States reservoir right of way to exclude recreational use of the stored water by the servient owners as a matter of Colorado law.

SUMMARY OF ARGUMENT

The District's interest under the federal grant is a nonexclusive easement for the storage of water for irrigation. Opinion at 17-20. The servient Landowners derive their title from the United States and took title subject to the District's interest. Opinion at 8. They have all of the rights of the United States to the use of their land. *Id.* "Any ambiguity in the grant is to be resolved favorably to a sovereign grantor." Opinion at 15, quoting *Great Northern Railway Co. v. United States*, 315 U.S. 262, 272 (1942).

This Court's conclusion of law that recreational use is inconsistent as a matter of law with the purpose of the reservoir easement, Opinion at 22, is patently wrong. It is contrary to common practice in Colorado, I.B.L.A. decisions, U.S. Court of Appeals decisions and a determination of the State Supervisor of the Bureau of Land Management. On February 11, 1960, the State Supervisor wrote to the Bijou Irrigation District, noting that the Empire Reservoir partially inundates public domain

lands, and determined that "the recreational uses of the public lands are compatible with the purpose for which the Empire reservoir was constructed, that of impounding water for irrigation." Peterson's Ex. 5. The Landowners submit that this Court must defer to the uncontradicted decisions of the federal agencies, courts and administrators charged with construing the federal grant, see *Great Northern*, 315 U.S. at 275; Opinion at 16, instead of construing the grant under state law to exclude recreational use in order to afford a broad scope to the exercise of a storage right.

The Court's use of Colorado's water law and easement law to construe the rights of the easement owner is clear error. It

> is incorrect that Colorado's common law controls the determination of the scope and effect of the right-of-way interest. Where essential interests of the federal government are concerned, rights and liabilities under government grant are determined by federal law and not state law. See, e.g., *United States v. 93.970 Acres of Land*, 360 U.S. 328.

City & County of Denver v. Berglund, 517 F. Supp. 155, 190 (D.Colo. 1981) *aff'd in part, rev'd in part*, 695 F.2d 465 (10th Cir. 1982).

ARGUMENT

This Court has ignored an elementary principle of Colorado's water law, that ownership and control of appropriated water vests no right to use another's land. As the Tenth Circuit stated in *Berglund*, "[i]t has long been settled that"

> The right to appropriate the waters of a stream does not carry with it the right to burden the lands of another with a ditch for the purpose of diverting the waters and carrying them to the place of intended use, *for that cannot be done without a grant from the landowner . . .* ; and this although the particular circumstances be such that the proposed appropriation cannot be effected without the ditch.

695 F.2d at 484 (quoting *Snyder v. Colorado Gold Dredging Co.*, 181 F. 62, 69 (8th Cir. 1910). The Tenth Circuit quoted also from the U.S. Supreme Court: "this is not a controversy over water-rights, but over rights of way through land of the United States, which is a different matter." 695 F.2d at 483, quoting *Utah Power and Light Co. v. United States*, 243 U.S. 389, 411 (1917). The *Berglund* Court squarely rejected a Denver argument that its right to "divert and utilize" water under its "Blue River Decree" entitled it to construct along a modified federal right of way. 695 F.2d at 483.

Having confirmed the trial court's decision that the easement was nonexclusive, this Court should have reviewed the trial court's findings, rather than determine *de novo*, that recreational use interfered as a matter of law with the interests of the easement owner. Opinion at 19. The trial court tried the issue of interference and found that "boating, water skiing, hunting and general recreation" on the reservoir "coexisted without interference to the management of the Reservoir." Trial Court Finding 35. The trial court found further that the "recreational use of the water has not deprived the farmers, included in the irrigation district, from obtaining the quality and quantity of water to which they are entitled." Trial Court

General Overview; and Conclusion 1. The court also found that "[p]rivate Landowners have not been shown to have physically interfered with the maintenance of the Reservoir." Finding 44.

The United States Supreme Court has held that interpretation of legislative enactments by the agency charged with administration of a statute must be given great weight in construing statutes. *Great Northern*, 315 U.S. at 275. The I.B.L.A. has consistently held that the owner of an 1891 Act reservoir right of way cannot exclude others from fishing. It follows *a fortiori* that a right of way owner cannot exclude servient owners as a matter of law.

The Landowners called I.B.L.A. decisions to this Court's attention in their Joint Answer Brief, and appended copies to the brief. *See Joe Stewart*, 33 IBLA 225, 228 (1977):

> Rights-of-way authorizing the impoundment of water for irrigation purposes under the act of March 3, 1891, section 18 *et seq.*, 43 U.S.C. § 946 *et seq.* (1964), *do not grant exclusive use of the waters impounded except as necessary to protect the grantee's use. U.S. v. Big Horn Land and Cattle Company*, 17 F.2d 357 (8th Cir. 1927); *Whitmore v. Pleasant Valley Coal Company, Inc.*, 75 P. 748 (Utah, 1904); *Grindstone Butte Project*, 18 IBLA 16 (1977); *Zelph S. Calder*, 16 IBLA 27, 81 I.D. 339 (1974). (Emphasis supplied.)

Thus, *Joe Stewart* held that a reservoir right-of-way fails to carry with it a right to fence people out except as may be necessary to protect the grantee's use. In the present case, the trial court found coexistence without interference.

The Interior Board of Land Appeals dealt with the exclusivity issue in *Grindstone Butte Project*, 18 IBLA 16,

19 (1974), *aff'd*, 638 F.2d 100 (9th Cir. 1981), and concluded as follows:

> The grant of a right-of-way under the 1891 Act *does not include exclusive possession and control* of the area. In *United States v. Big Horn Land & Cattle Co.*, 17 F.2d 357, 366 (8th Cir. 1927), the court held that a right granted under the 1891 Act, which included use of a natural lake as a reservoir, *did not carry with it exclusive fishing rights in the Lake. The right was held subject to access and privileges by United States citizens. See Zelph S. Calder, supra,* at 39, 81 I.D. at 345. (Emphasis supplied.)

In *Dixon v. Dry Gulch Ins. Co.*, 45 I.D. 4 (1916), the Interior Department determined that:

> *It is the policy of this Department to secure the utilization of reservoir sites to the largest extent possible, and if that end can be attained by double use, it is believed that same should be permitted.* Such is the effect of the principle announced in the cases of the Deseret [sic] Irrigation Company *et al.* (40 L.D., 463) and H. H. Tomkins (41 L.D., 516). (Emphasis supplied.)

Similarly, the I.B.L.A. held in *Zelph S. Calder*, 16 IBLA 27, 81 I.D. 339, 345 (1974), that a right-of-way under the Act of March 3, 1891, does not give the grantee exclusive fishing rights:

> That a reservoir right obtained under the 1891 Act *does not* include piscatorial privileges in the reservoir and *allow the grantee to bar the public from fishing from federal lands covered by the right-of-way is clear.* (Emphasis supplied.)

This Court's attention is directed to *United States v. Big Horn Land & Cattle Co.*, 17 F.2d 357 (8th Cir. 1927), where the court dealt with the "Big Creek Lakes" in

Jackson County, Colorado. Like the District in this case, the defendant in *Big Horn* owned a reservoir easement, and claimed the right "to keep persons from trespassing upon, fishing in, or otherwise using the waters." 17 F.2d at 360. The court reversed a United States District Court conclusion of exclusivity, and held that "[t]he defendant, of course, will have equal access and privileges with all other citizens of the United States to Big Creek Lakes." 17 F.2d at 366. See also *Coulsen v. Aberdeen – Springfield Land Co.*, 47 Idaho 619, 277 P. 542 (1929) ("No greater title or right to possession passes under a general grant than reasonably necessary to enable the grantee to adequately and conveniently make the intended use of his way.") 277 P.2d at 544.

The trial court's findings of fact of noninterference inundate this Court's conclusion of law that recreational use "would unreasonably interfere with the exercise of that right [to store water]." Opinion at 22. This Court's *de novo* finding of "unreasonable interference" to the storage of water is astonishing. After all, the District itself was charging $6,000.00 per year for a Kennicott Duck Club lease, P. Ex. B; $5,500.00 for a Morgan Recreation Club lease, P. Ex. R; and $2,100.00 for a Wiggins Boating Club lease, P. Ex. T. As the BLM noted in Peterson's Ex. 12 (BLM letter to Bijou Irrigation System), it

> recognized the public values inherent in conserving this important warm water fisheries and riparian habitat for migratory waterfowl, white pelicans, and bald eagles. *The Colorado Division of Wildlife has adjoining land and provides fishing access to the reservoir.* As a public agency, the BLM is charged with conserving and enhancing these public values.

CONCLUSION

Whether a use unreasonably interferes with a water right is obviously a question of fact. It can never be a question of law. If it is a question of law, federal law, not state law, applies. It is error to apply Colorado's common law to exclude servient owners from using the water above their land for recreational purposes, after (a) I.B.L.A. and U.S. Court of Appeals decisions that the public has the right of access to a reservoir for fishing; (b) a 1960 determination by the BLM State Supervisor that recreational use of public domain underlying Empire Reservoir is compatible with the storage of water; (c) a trial court's findings that the Landowners have not interfered with the storage of water for irrigation; (d) an elementary rule of Colorado's water law that an appropriated water right does not carry with it the right to burden another's land; (e) the Tenth Circuit's decision that an appropriator's right to "divert and utilize" water is irrelevant to the scope of a federal right of way; and (f) an unquestionable rule of law that Colorado's common law is irrelevant to the construction of a federal right of way.

APPENDIX 6

EXCERPTS FROM PAGES 1-2, 11-14 OF LANDOWNERS' CLOSING BRIEF FILED IN DISTRICT COURT FOR MORGAN COUNTY

SUMMARY OF ARGUMENT CITING PRINCIPAL AUTHORITY

A. The Right-Of-Way Under The 1891 Act Is A Non-Exclusive Easement Which Gives The District No Right To Exclude The Defendants.

Great Northern Rwy. Co. v. U.S., 257 U.S. 147 (1921)
United States v. Big Horn Land & Cattle Co., 17 F.2d 357 (8th Cir. 1927)
Zelph S. Calder, 16 IBLA 27, 81 ID 339 (June 20, 1974)
Joe Stewart, 33 IBLA 225, 228 (December 28, 1977)
Fred Markle, 6 IBLA 52, 54 (May 18, 1972)
E.E. Eggebrecht, Inc. v. Waters, 704 P.2d 422 (Mont. 1985)
Coulsen v. Aberdeen-Springfield Canal Co., 47 Idaho 619, 277 P. 542 (1929)

A. The District's Right-of-Way Granted Pursuant to the Act of March 3, 1891, 43 U.S.C. §946, is a Non-Exclusive Easement

As analyzed in Defendants' trial brief at 3-14, filed with the Court on February 9, 1987 ("Trial Br."), the District has only a non-exclusive easement for the Reservoir pursuant to its grant of a right-of-way under the 1891 Act. The District's reliance on *Kern River Co. v. United States*, 257 U.S. 147 (1921) is misplaced. As explained more fully in the Trial Br. at 9-11, *Great Northern Railway Co. v. United States*, 315 U.S. 262 (1942), the United States Supreme Court reversed the underlying

premise of the *Kern River* decision, holding that the language in the 1891 Act was similar to the 1875 Railroad Rights-of-Way Act and that Congress must have intended for these acts to authorize the grant of easements, not limited fees. *Great Northern*, 315 U.S. at 275-76. In *United States v. Big Horn Land & Cattle Co.*, 17 F.2d 357 (8th Cir. 1927), the court even before the *Great Northern* decision, clearly held that a right of way holder's interest was non-exclusive. *Accord Hutson v. Agricultural Ditch & Reservoir Co.*, 723 P.2d 736, 739-40 (Colo. 1986) ("right-of-way" traditionally has been construed to mean an easement and not a limited fee); *Bergen Ditch & Reservoir Co. v. Barnes ("Bergen Ditch")*, 683 P.2d 365, 367 (Colo. App. 1984).

The United States Supreme Court has held that interpretation of legislative enactments by the agency charged with administration of a statute is to be given great weight in construing statutory language. *See Great Northern*, 315 U.S. at 275. Administrative decisions of the Interior Board of Land Appeals ("IBLA") uniformly have held that a right-of-way under the 1891 Act is a non-exclusive easement. *See* Trial Br. at 13-14, citing *Zelph S. Calder*, 16 IBLA 27, 81 ID 339 (June 20, 1974); *Joe Stewart*, 33 IBLA 225, 228 (December 28, 1977): *Grindstone Butte Project*, 18 IBLA 16, 19 (November 7, 1974), *aff'd*. 638 F.2d 100 (9th Cir. 1981); *Fred Markle*, 6 IBLA 52, 54 (May 18, 1972); *Dixon v. Dry Gulch Irr. Co.*, 45 ID 4 (March 10, 1916).[1]

---

[1] Interestingly, the District fails to even address these administrative cases or the *Great Northern* decision.

The state court authority cited by the District pales in comparison to the above citations. These cases fail to consider the impact of *Great Northern* on the *Kern River* decision. First, *Johnson Irrigation Co. v. Ivory*, 46 Wyo. 221, 24 P.2d 1053 (1933), was decided prior to the *Great Northern* decision. There the Wyoming Supreme Court relied on *Kern River* to discount prior case law indicating that reservoir easements are non-exclusive and stated that "These decisions, however, are not satisfactory authority in the case at bar, because they proceed on the theory that the right-of-way is a mere easement." *Johnson*, 24 P.2d at 1056. Since *Great Northern* and IBLA decisions clearly hold that the 1891 Act conveys only an easement, there is no doubt that today, even the *Johnson* court would have ruled that a right-of-way under the 1891 Act conveys only a non-exclusive right of use, i.e. an easement.[2]

Similarly, in *Wiltbank v. Lyman Water Co.*, 13 Ariz. App. 485, 477 P.2d 771 (1970), *pet. for review vac'd. and dismissed*, 485 P.2d 822, the court simply failed to cite *Great Northern* or recognize its impact on the *Kern River* decision. This infirmity in the *Wiltbank* decision was recognized by the Montana Supreme Court in *E.E. Eggebrecht, Inc. v. Waters*, 704 P.2d 422 (Mont. 1985), where the court stated that in light of *Great Northern*, "It follows therefore that the designation in *Kern River*, that the reservoir right-of-way under the 1891 Act is a limited fee, rests

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[2] Moreover, the *Johnson* court found that the right-of-way holder had only a non-exclusive easement for maintenance in a 50-foot area above the reservoir, even under *Kern River*. *Johnson*, 24 P.2d at 1056.

on shaky legal foundation." *E.E. Eggebrecht*, 704 P.2d at 425.

Under U.S. Supreme Court caselaw, and federal, administrative and the better-reasoned state law decisions, the District holds only a non-exclusive easement for the storage of water for the main purpose of irrigation.[3]

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[3] The District makes an issue over the term "main purpose" in its right-of-way grant under the 1891 Act. This is a wholly specious argument. The express statutory language of 43 U.S.C. § 951, the amendment to the 1891 Act, allows for specific subsidiary uses of reservoir rights-of-way granted under the 1891 Act so long as the main purpose of the grant is irrigation. The language cited by the District does nothing to expand the scope of the rights granted to the District.

APPENDIX 7

EXCERPTS FROM PAGES 8-20 OF DEFENDANTS-APPELLEES' (LANDOWNERS') JOINT ANSWER BRIEF, FILED AUGUST 10, 1988, IN COLORADO COURT OF APPEALS, TRANSFERRED SUBSEQUENTLY TO COLORADO SUPREME COURT IN CASE NO. 89SA302

III. ARGUMENT

A. Summary Of Argument

1. The District operates the Reservoir pursuant to a federal right-of-way granted by the BLM under the Act of March 3, 1891, 43 U.S.C. §946-949, as amended, 43 U.S.C. §951 (Appendix 2). Under the clear holding of *Great Northern Railway Co. v. United States*, 315 U.S. 262 (1942), and administrative law decisions of the Interior Board of Land Appeals, the District has only a non-exclusive easement to store water for irrigation and other subsidiary purposes (not including recreation). This right-of-way does not empower the District to exclude the landowners or members of the public with lawful access to the Reservoir.

* * *

C. The Trial Court Correctly Construed The District's Federal Right-Of-Way, Granted Pursuant To The Act of March 3, 1891, 43 U.S.C. §946, As A Non-Exclusive Easement

In its opening brief, the District asserts that it is entitled to exclusive ownership and the right of control of the water stored in the Empire Reservoir and the Reservoir site up to 50 feet above the high water line, by virtue of its 1907 right-of-way granted by the BLM. *See* District Brief, at 12-22. The District asserts that the right-of-way

under which it occupies and operates the Reservoir is a "limited fee" interest, allowing the District to exclude others from the right-of-way. This assertion is unsupported by law, is wholly inconsistent with the District's Stipulation with the State of Colorado and is contrary to the position taken by the BLM, the agency charged with administering the District's right-of-way.

The District does not dispute that, other than a small portion of shoreline, it does not own the Reservoir site. Rather, it operates the Reservoir pursuant to a federal right-of-way (District Ex. I, V4, P42, L8-9; P43, L11-23) granted under §§18-21 of the Act of March 3, 1891, 26 Stat. 1095, 1101, 43 U.S.C. §946-949 (the "1891 Act") (Appendix 2), as amended by the Act of May 11, 1898, 43 U.S.C. §951. The relevant language of 43 U.S.C. §946 (Appendix 2) is as follows:[1]

> The right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company [, irrigation or drainage district] formed for the purpose of irrigation [or drainage], and duly organized under the laws of any State or Territory . . . to the extent of the ground occupied by the water of any reservoir and of any canals and laterals and fifty feet on the side of the marginal limits thereof . . .

The Act of May 11, 1898, 43 U.S.C. §951, (Appendix 2) provides that rights-of-way issued pursuant to the 1891

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[1] The language quoted is from the 1986 edition of *U.S.C.A.*, which includes language added by amendments of 1917 and 1926. This additional language, added after the grant of the relevant right-of-way to the District, is bracketed.

Act may be used for water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation or drainage.

Congress narrowly tailored the rights-of-way issued pursuant to the 1891 Act so as to grant only those rights necessary to carry out the intended purpose of the right-of-way, namely irrigation. *See* 43 U.S.C. §949 (Appendix 2), March 3, 1891, C. 561 §21, which states as follows: "Nothing in sections 946-949 of this title shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch."[2] Shortly after the passage of these statutes, the Department of Interior, the federal agency charged with administering these rights-of-way, construed them as "a right of use only, the title still remaining in the United States . . . . " *Homer E. Brayton*, 31 L.D.364 (July 2, 1902) (Appendix 3).

The District mistakenly relies on *Kern River Co. v. United States ("Kern River")*, 257 U.S. 147, 42 S.Ct. 60, 66 L.Ed. 175 (1921) for a contrary proposition. In *Kern River*, the Secretary of the Interior brought an action for the cancellation of an 1891 Act right-of-way, on the basis that the right-of-way was fraudulently obtained and that it had been used exclusively for the generation of electric

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[2] Sections 947 [March 3, 1891, C. 561, §19] and 948 (March 3, 1891, C. 561, §20) provide that an applicant must file with the federal land office a map of its proposed canal, ditch or reservoir and upon approval by the Secretary of the Interior of the same, must complete the structure within five years from the date of the approval.

power, contrary to the purpose of the grant. The Court stated that the right-of-way intended by the Act was neither a mere easement nor a fee simple absolute, but a limited fee on an implied conditional reverter in the event the grantee ceased to use or retain the land for the purpose indicated in the Act. 257 U.S. at 152. The sole authority cited by the Court for this proposition was *Rio Grande Western R. Co. v. Stringham* ("*Stringham*"), 239 U.S. 44, 47, 36 S.Ct. 5, 60 L.Ed. 136 (1915).

The question before the Court in *Stringham* was whether a railroad right-of-way under the Act of March 3, 1875, C. 152, 18 Stat. at 482, 43 U.S.C. §934, constitutes a grant of an interest sufficient for the right-of-way holder to prevent the holder of an overlapping placer mining claim from developing that claim. The Court held, in language almost identical to that stated in *Kern River*, that "The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee . . . and carries with it the incidents and remedies usually attending the fee." 239 U.S. at 47. Therefore, the *Kern River* holding that the reservoir right-of-way was a limited fee was based on the *Stringham* decision that the Railroad Right of Way Act of 1875 and similar acts granted limited fee interests.

Subsequent courts have construed the *Kern River* holding narrowly and held that the Supreme Court's characterization of this interest as a limited fee did not afford the grantee the right to exclude others from using the reservoir constructed under the 1891 Act. In *United States v. Big Horn Land & Cattle Co.*, ("*Big Horn*"), 17 F.2d 357 (8th Cir. 1927), the Department of the Interior sued Big Horn Land & Cattle Co., a Colorado corporation, for

forfeiture of a right-of-way issued pursuant to the 1891 Act. In addition, the government claimed that the defendant unlawfully had asserted a right to exclusive possession of the land and waters encompassed by the right-of-way and had occupied the same as a private fishing reserve to the exclusion of all other persons and the public generally. The government demonstrated that the defendant had posted "No Trespassing" signs around the reservoir site. The defendant asserted that it had an ownership interest in the reservoir and had exclusively used the reservoir site for a period of twenty years.

The Court rejected the defendant's claim of exclusivity, holding that:

> The defendant, of course, will have equal access and privileges with all other citizens of the United States to Big Creek Lakes [the lakes encompassed by the reservoir site].

Big Horn, 17 F.2d at 366. Both parties had relied on *Kern River* and *Stringham* to support their positions. In interpreting these cases, the Court stated as follows: "We think, it, therefore, not important whether the interest or estate passed be considered an easement or a limited fee. In any event it is a limited fee in the nature of an easement." *Big Horn*, 17 F.2d at 365.[3]

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[3] To the same effect is the state court decision in *Coulsen v. Aberdeen-Springfield Canal Co.*, 47 Idaho 619, 277 P. 542 (1929). In *Coulsen*, the court reversed dismissal of a claim by a fee owner against the holder of a ditch right-of-way issued under the 1891 Act for the value of his bull which had died as a result of injuries sustained by its falling into the ditch. The defendant claimed that its right-of-way gave exclusive control over the

(Continued on following page)

The final death knell of the *Kern River* limited fee analysis for rights-of-way granted pursuant to the 1891 Act was sounded in *Great Northern Railway Co. v. United States*, 315 U.S. 262, 62 S.Ct. 529, 86 L.Ed. 836 (1942). In *Great Northern*, the U.S. Supreme Court considered whether a holder of a railroad right-of-way issued under the Act of March 3, 1987, which was interpreted in *Stringham* and which formed the basis of the *Kern River* decision, could remove minerals from the subsurface underlying the right-of-way. The Court overruled *Stringham* and held that a railroad right-of-way issued under the Act of 1875 "clearly grants only an easement, and not a fee." 315 U.S. at 271. The Court based this holding on the plain wording of the statute, as well as on the legislative history prior to the passage of this Act, and stated that while rights-of-way issued prior to 1871 may have been deemed limited fees, all rights-of-way subsequently issued were mere easements. The Court then expressly relied on Department of Interior decisions interpreting

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(Continued from previous page)

lands within the right-of-way and that defendant's cattle were trespassing upon its right-of-way. The Court reviewed the relevant authority and held that a ditch right-of-way is substantially different from a railroad right-of-way in that a ditch right-of-way does not necessarily require exclusive use and control. The Court held that "No greater title or right to possession passes under a general grant than reasonably necessary to enable the grantee to adequately and conveniently make the intended use of his way." *Coulsen*, 277 P.2d at 544. The Court held that the defendant had no right to exclude the fee owner from using the lands appurtenant to the right-of-way for grazing where such use did not interfere with the operation, maintenance or repair of the ditch.

the 1875 Act and on subsequently enacted legislation, namely, the 1891 Act. To this effect, the Court stated that *"This early administrative gloss received indirect Congressional approval when Congress repeated the language of the Act [the 1875 Act] in granting canal and reservoir companies rights-of-way by the Act of March 3, 1891, chap. 561, 226 Stat. at L.1101 . . . . "* 315 U.S. at 275-276 (emphasis added). So clear was it to the Court that rights-of-way under the 1891 Act were mere easements that the Court cited the Act to support its interpretation that the 1875 Act also granted an easement and not a fee interest.[4]

Great Northern compels the conclusion that a right-of-way granted pursuant to the 1891 Act is a mere easement only for the purposes specified in the Act, in this case, storage of water for irrigation purposes. *Cf.* 43 U.S.C. §949. It is equally clear that this easement does not give the District the right to exclude surrounding landowners or members of the public who are lawfully entitled to access the surface of the Reservoir *Big Horn, supra; Coulsen, supra.* To adopt the District's construction would result in the District having the unwarranted power to exclude the DOW, the BLM and members of the public from the water overlying the public lands.

Decisions of the Interior Board of Land Appeals similarly reject the District's claim of exclusive use of the Empire Reservoir. In *Zelph S. Calder*, 16 IBLA 27, 81 ID 339

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[4] This holding is further supported by a Colorado Supreme Court decision holding that the term "right-of-way" traditionally has been construed to mean an easement and not a limited fee. *Hutson v. Agricultural Ditch & Reservoir Co.*, 723 P.2d 736, 739-40 (Colo. 1986)

(June 20, 1974) (Appendix 4), the IBLA held that a right-of-way under the 1891 Act may be used only for irrigation and those subsidiary uses specified in 43 U.S.C. §951. With regard to the claimed exclusivity of the subject reservoir for fish culture and stock watering, the IBLA held:

> That a reservoir right of way obtained under the 1891 Act does not include piscatorial privileges in the reservoir and allow the grantee to bar the public from fishing from federal lands covered by the right of way is clear. [*Big Horn Land & Cattle*] Likewise, we see no authorization for an exclusive stock watering right based on an 1891 Act right of way . . . The scope of rights obtained under the 1891 Act have been limited to those expressly authorized by the Act. The limitation of 43 U.S.C. §949 (1970), as to occupancy of a right of way only for the purposes of the Act is applicable to reservoirs.

81 ID at 345. *Accord Joe Stewart*, 33 IBLA 225, 228 (Dec. 28, 1977) (Appendix 5) ("Rights-of-way authorizing the impoundment of water for irrigation purposes under the Act of March 3, 1891, section 18 *et seq.*, 43 U.S.C §946 *et seq.* (1964), do not grant exclusive use of the waters impounded except as necessary to protect the grantee's use. [citations omitted] Thus, no fence may be constructed except as necessary to protect the reservoir"); *Grindstone Butte Project*, 18 IBLA 16, 19 (Nov. 7, 1974) (Appendix 6), *aff'd* 638 F.2d 100 (9th Cir. 1981) (right-of-way under 1891 Act is easement and can be conditioned by Secretary to protect public interest); *Fred Markle*, 6 IBLA 52, 54 (May 18, 1972) (Appendix 7) (since *Great Northern* decision, Department has considered 1891 Act rights-of-way as easements, subject to cancellation);

Dixon v. Dry Gulch Irrigation Co., 45 ID 4 (March 10, 1916) (Appendix 8) (Department of the Interior policy favors the grant of multiple easements under the 1891 Act where a particular reservoir is of sufficient capacity to store water for both claimants).

The state court authority cited by the District is unpersuasive. First, *Johnson Irrigation Co. v. Ivory*, 46 Wyo. 221, 24 P.2d 1053 (1933), was decided prior to the *Great Northern* decision. There, the Wyoming Supreme Court relied on *Kern River* to discount prior case law indicating that reservoir easements are non-exclusive and stated that "These decisions, however, are not satisfactory authority in the case at bar, because they proceed on the theory that the right-of-way is a mere easement." *Johnson*, 24 P.2d at 1056. Since *Great Northern* and IBLA decisions clearly hold that the 1891 Act conveys only an easement, there is no doubt that today, even the *Johnson* court would have ruled that a right-of-way under the 1891 Act conveys only a non-exclusive right of use, i.e. an easement.[5]

In *Wiltbank v. Lyman Water Co.*, 13 Ariz. App. 485, 477 P.2d 771 (1970), *pet. for review vac'd. and dismissed*, 485 P.2d 822, the court simply failed to cite *Great Northern* or recognize its impact on the *Kern River* decision. This infirmity in the *Wiltbank* decision was recognized by the Montana Supreme Court in *E.E. Eggebrecht, Inc. v. Waters*, 704 P.2d 422 (Mont. 1985), where the court stated that in light of *Great Northern*. "It follows therefore that the

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[5] Moreover, the *Johnson* court found that the right-of-way holder had only a non-exclusive easement for maintenance in a 50-foot area above the reservoir, even under *Kern River*. *Johnson*, 24 P.2d at 1056.

designation in *Kern River*, that the reservoir right-of-way under the 1891 Act is a limited fee, rests on a shakey [sic] legal foundation." *E.E. Eggebrecht*, 704 P.2d at 425.

Under U.S. Supreme Court caselaw, and federal, administrative and the better-reasoned state law decisions, the District holds only a non-exclusive easement for the storage of water for the main purpose of irrigation.

APPENDIX 8

Peterson's Ex. #5
Case 83CV132

[SEAL] IN REPLY REFER TO:

U.S. DEPARTMENT OF THE INTERIOR 5.221-2
MARCH 3, 1849 C-09807

UNITED STATES
DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT
Colorado State Office
339 New Custom House
P. O. Box 1018
Denver 1, Colorado

FEB 11 1960

Empire Ditch and Reservoir Company
Bijou Irrigation District
Fort Morgan, Colorado

Gentlemen:

The Empire Reservoir, located on the Weld-Morgan County line near Wiggins, Colorado, partially inundates public domain lands for which your company now holds a right-of-way for operation of the reservoir and appurtenant structures. These lands are located in:

Sixth Principal Meridian, Colorado

T. 3 N., R. 61 W.,
Sec. 1, E1/2NW1/4, NE1/4SW1/4;
Sec. 2, NW1/4NE1/4;

T. 4 N., R. 60 W.,
Sec. 30, S1/2SW1/4;
Sec. 31, W1/2;

T. 4 N., R. 61 W.,
Sec. 25, S1/2S1/2, NE1/4SW1/4, NW1/4SE1/4;
Sec. 26, SE1/4SE1/4;

Sec. 35, E1/2, E1/2W1/2, W1/2NW1/4, NW1/4 SW1/4.

We have received an application from the U.S. Fish and Wildlife Service for the withdrawal of these lands under the Coordination Act for management by the Colorado Game and Fish Department. It appears that the recreational uses of the public lands are compatible with the purpose for which the reservoir was constructed, that of impounding water for irrigation. This Bureau is required by law and regulations to approve or deny the application b the U.S. Fish and Wildlife Service.

It has also been brought to our attention that the access to the public lands from county roads and U.S. Highway 34 has been blocked. In order to resolve the apparent conflict that has been brought to our attention, we feel that it would be advantageous to meet with representatives of your company, and the Colorado Game and Fish Department, to discuss use and control of the public lands involved in the reservoir site. To take advantage of the records in this office, we feel that possibly Denver would be the best place to meet with you. Therefore, we are asking that you name a date to come to our office and discuss this problem. If you find that you are unable to come to Denver, we will attempt to arrange for a meeting in Fort Morgan.

We will appreciate your cooperation in this matter.

Sincerely yours,

/s/ Lowell M. Puckett
LOWELL M. PUCKETT
State Supervisor